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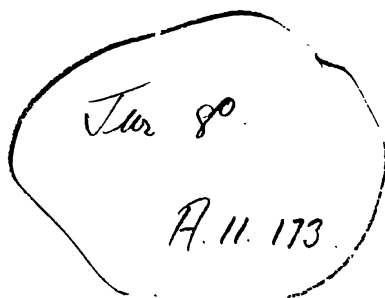
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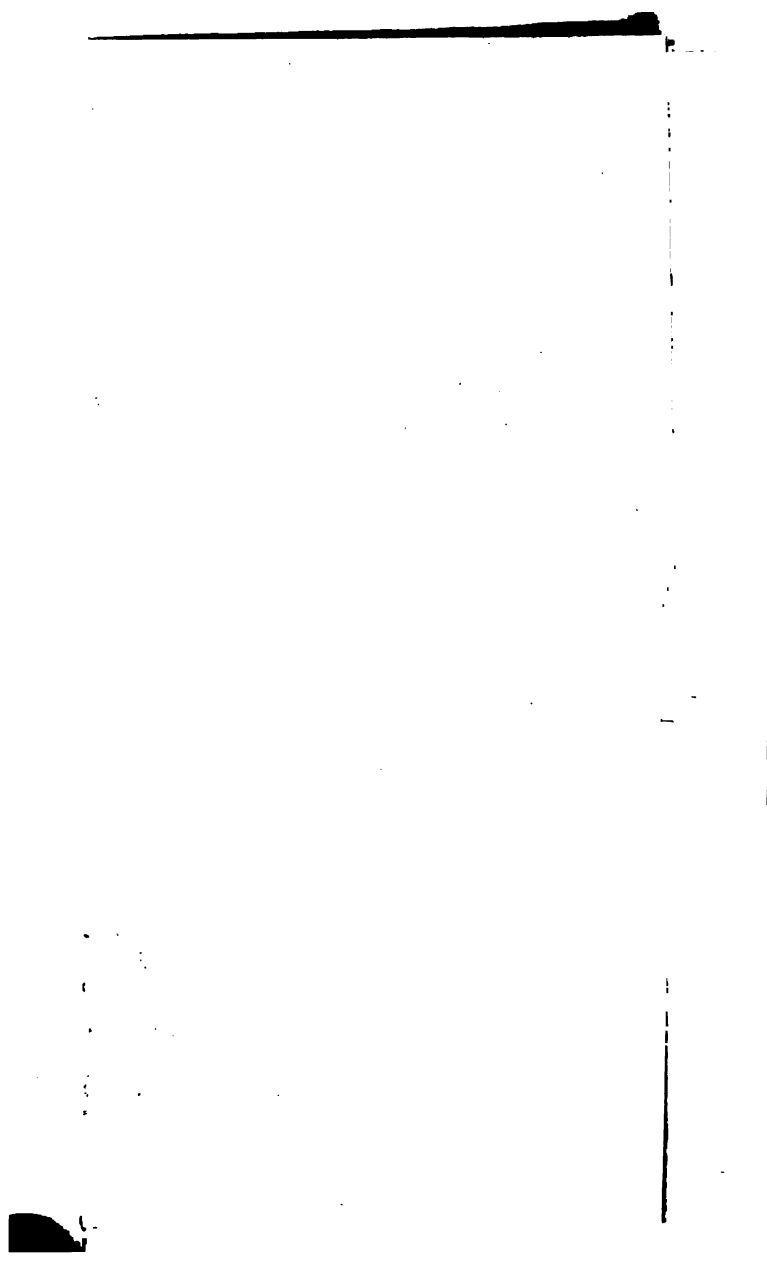
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L.S. 1/229
DIRECTION

OR

PREPARATIVE

TO

The Study of the Law;

WHEREIN IS SHEWED,

WHAT THINGS OUGHT TO BE OBSERVED AND
USED OF THEM THAT ARE ADDICTED
TO THE STUDY OF THE LAW,

AND WHAT, ON THE CONTRARY PART, OUGHT
TO BE ESCHEWED AND AVOIDED.

BY WILLIAM FULBECK, ESQ.

SECOND EDITION, REVISED.

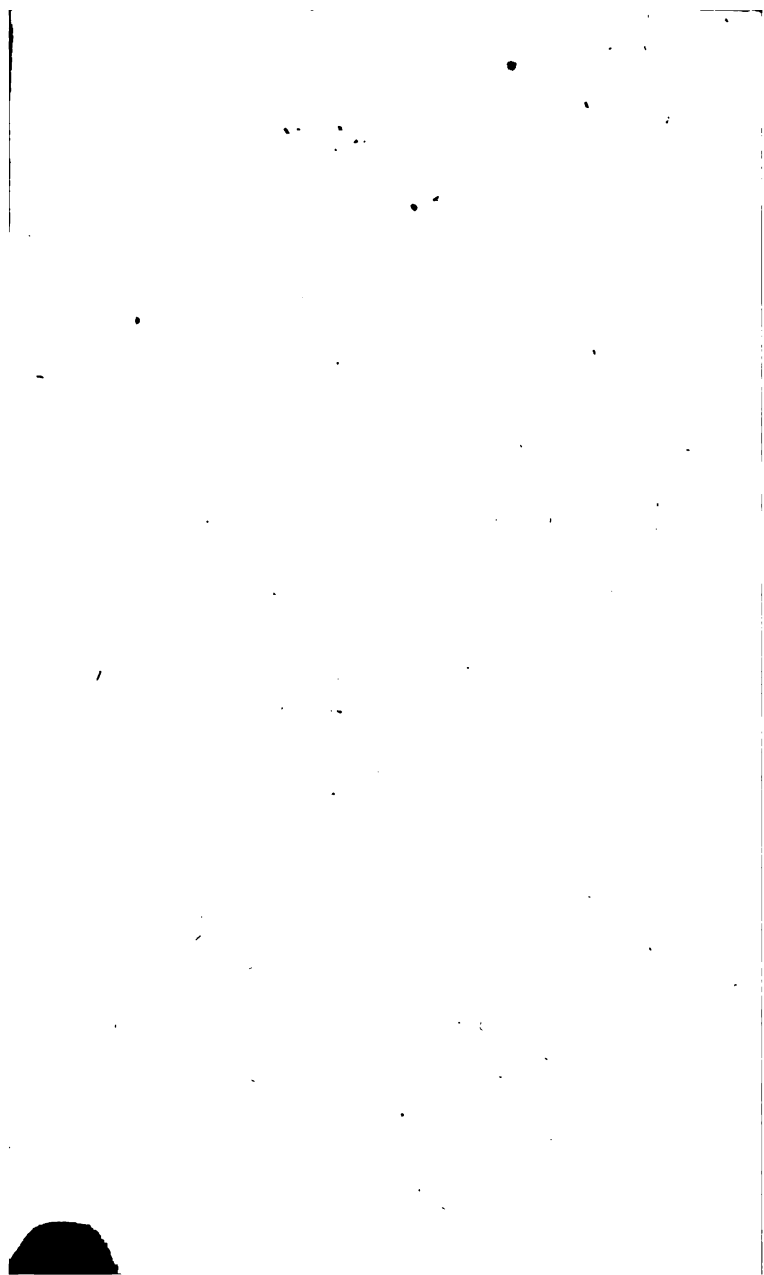
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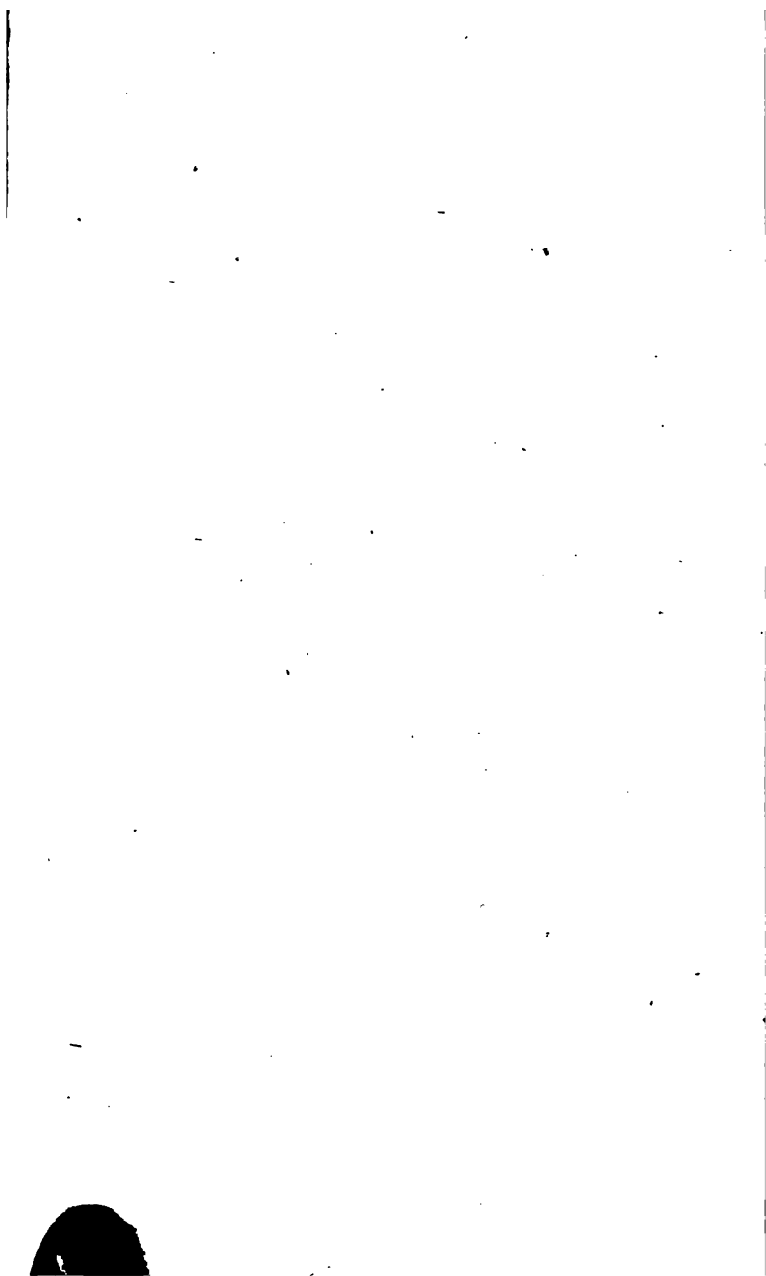
1829.





TO THE READER.

THE high estimation in which the following Treatise has always been held on account of its superior learning and legal information, and the great difficulty there lately has been in procuring it, has induced this republication. No alteration has been made except in the type, the orthography, and in publishing the Prior's Case in the English language, which by some gentlemen of great experience in the profession of the Law, was thought the most eligible in a preparatory Treatise. Some few inaccuracies have escaped the Compositor after the correction of the Press, as *In tail* for *Intail*, *Warrantry* for *Warranty*, &c. but they are merely literal.



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JUVENIBUS IN HOSPITIIS CURIALIBUS
CONNUTRITIIS, ET JURIS ANGLICANI
STUDIO OPERAM NAVANTIBUS ASSI-
DUAM.—S.

SI Theophrastum, ut ipsum nomen indicat, oratione divinum, circumscripta quædam spatia, et angusti umbraculorum circuli á frequenti auditorum corona, et publico judicum consessu detinere: Si Socrates, quem sapientissimum virum, Apollo sapientissimus Ethnicorum Dæmon judicavit, nihilo plura volumina edidit, quàm condidit, id est, nulla: mihi quidem generosissimi juvenes, non solum in scribendi initiis, sed in umbilico etiam et crure valdè metuendum est, ne prima mediis, media ultimis, omnia omnibus, non appositè respondeant: Quæ enim parcè nimis traduntur desiderium, quæ prolixè fastidium pariunt, et medium quæsitum invenire difficile, inventum te-

THE EPISTLE.

nere difficillimum: Cum hanc arduam sanè provinciam primo ingressus fueram, istud me recreavit et sustentavit solatium. Qui curas suscipiunt graviores si mansuetis ingeniis uti volunt iudicibus, eorum audere, est agere, velle est posse, velitari est vincere. Fateor in aliquibus tenens, ultra, plus ultra perventum esse: Sed vel metam ipsam attingere, imò verò ad eam contendere, sudoris est et virtutis: Quanquam hoc Ævo, in hoc presertim Britanniae Elysio, nihil in delictis habetur præter meras orationis illecebras: mira certè quæ placeant, vermiculata verba, nectareas phrases, eloquentiam Atticam exposcunt, omnia limata, arguta, sententiosa esse volunt, planè Aristippii sunt singuli

prave sectum stomachantur ob unguem.

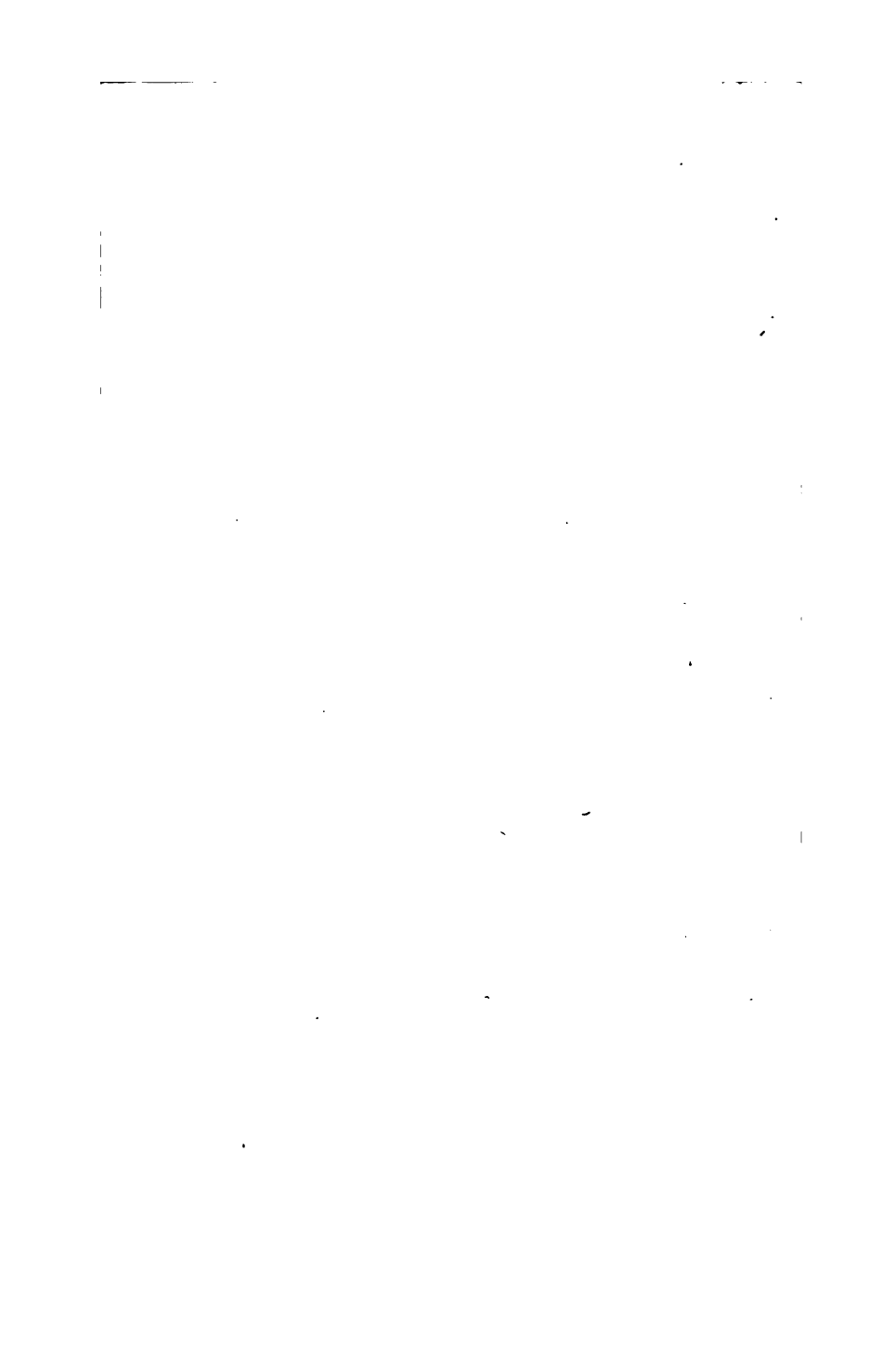
Quarè seria et submissa prece, mihi vehementer obsecrandi estis insignissimi juvenes, ut hic potius otii mei foetus quam laboris fructus (vacatio enim hæc proxima quàm sub æquinotium autumnale Londini non admodum invitatus egi, cum ad privata studia et negotia multum

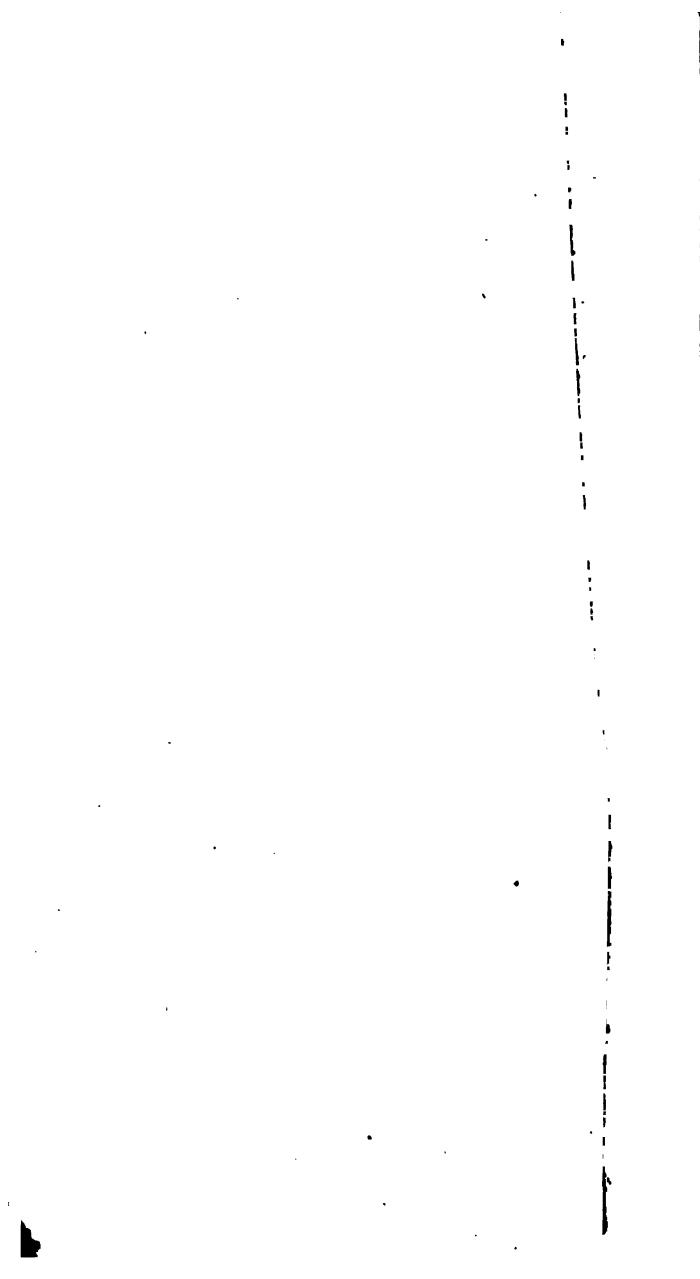
THE EPISTLE.

*superesset temporis, hanc vobis prolem
peperit) sub candoris vestri radiis calorem
et vires recipiat: cujus si compos fuerit,
debebit ille quidem vigorem suum vobis,
lucis usuram mihi, fortunam mundo.
Valete: Ex hospitio Graiano: pridie
Nonas Septemb. Ann. salutis humanæ
1599.*

Vobis addictissimus
GULIELMUS FULBECKUS.







Fulbeck's
DIRECTION, OR PREPARATIVE
TO THE
STUDY OF THE LAW.

CHAP. I.

ON THE WORTHINESS AND EXCELLENCY
OF THE LAW.

As nothing more encourageth the soldier to fight, and to give forth apparent signs of valour, than the glory and renown which is gained by exploits of war; so nothing is a greater spur to the student of any art or science, than the just reward of fame and commendation, which belongeth to those, who by labour attain to perfection in any praise-worthy science. For as nature rewardeth the bee with honey, so art

recompenseth the painful student with riches, praise, or honour. And, howbeit, some men make small account of praise or good report, as being in their own conceit but an empty sound, yet wise men have thought and written, that a good name is better than gold*, and that a man's credit is the fairest flower of his garden. Now if praise be due to arts and sciences, as being the best treasure and endowment of the mind, religion only excepted, then surely the knowledge of the law may, in the first place, challenge prerogative of dignity, by whose righteous doom and decree it is provided, ruled, and ordered, that all other sciences should have their maintenance and support, in such plentiful and condign manner, as by merit or equity doth to them of right appertain. But every art receiveth its commendation by the end and scope which it proposeth to itself., And the chief end or last mark of the law, as well as other sciences, is God's glory. But the next and immediate end which is allotted

* Proverb. 22. Aym. conf. 145, viso processu in fi.



to it, is to administer justice to all, and in that sense it may be called the rule of justice: for religion, justice, and law do stand together, and are together trod under foot by such as neither care for God nor goodness: such as are rehearsed by one of notable judgment*. A wise man without works, an old man without devotion, a young man without obedience, a rich man without alms, a woman without chastity, a gentleman without virtue, a contentious christian, a proud beggar, an unjust king, a negligent bishop, a congregation without discipline, a nation without law. But justice is then rightly administered, when it is not sold†. When there is no respect of persons‡. When hatred is away and conscience is present§. When rigour is tempered with mercy||. And justice must be regarded of the law as the load-star is minded of the seaman, for without it

* Cyprian de 12, abusio.

† Can. venden. q. 3. Canon pauper 11. q. 3.

‡ Deuteron. 1.

§ Can. sex. 23. q. 3.

|| Can. omnis & sequ. Can. discipli. 45. dist.

can be no government. Another end of the law is the good estate of the people. For it is an *aphorisme* amongst the laws of the 12 tables: *Salus populi suprema lex esto*. Let the safety of the people be accounted the chief law *. And that deserveth not the name of a law which hath no relation to public profit†: For Hermogenes said well, that every law was made for the good and profit of men‡. And Plato saith, that a law-maker ought to have regard of three things especially; namely, That the convenient liberty of the common-weal may not be impeached by the laws, that they may preserve amity amongst the people, and that they may furnish them with wisdom§. Wherefore, they that despise laws have no care of common profit||, because they were made for common use ¶, and without law, which I interpret to be an order established by authority, neither house, nor city, nor na-

* L. 12. tabular. c. 6.

† Cicer. 2. de legi.

‡ Lib. 2. de stat hominum.

§ Lib. 2. de legi.

|| Cicer, pro Cæcin.

¶ Lib. 2, de legi,

tion, nor mankind, nor nature, nor world can be*. And, therefore, Cicero saith, that our ancestors were of such virtue and wisdom, that in making of their laws they had no regard but of public good†: for they would not write any thing to hurt, and if they had written any such things, it would have been rejected as soon as it had been understood. It is manifest, therefore, that the end at which the law doth aim, is the general advantage of common society in a just manner distributed and dealt to every one. For *non sufficit bonum fieri nisi bene fiat*, it is not sufficient to do that which is good unless it be done in good sort, and, therefore, let not any man which undertaketh this profession lay conscience aside; for though the charge and calling be secular, yet it must be religiously handled. For God is the author of the law, and the revenger of the abuse thereof. The weight and measure, saith Solomon‡, are God's judgments, and

* Cicer. lib. 3. de legi.

† Cicer. lib. 1. de invent.

‡ Proverbs 16.

therefore if any man maintain any wrong by colour or pretence of law, let him know, that though man be hurt, yet God is offended*; ye do not execute the judgment of man, but of God, saith Josaphat. God is the beholder and umpire of councils and judgments, and surely if a man do well discharge this weighty and excellent function, there is no man of any religious habit or vocation in higher place or greater reckoning with God. So much the more are they to be reprov'd who exercise sycophancy, fraud, and cavelling in the handling of causes, being wresters of laws and wringers of money, whose conquest in bad causes makes them triumph as much as Romulus did when he had killed his brother; nay, as Atreus did when he had compassed the death of his brother Thyestes, boasting and glorying†, *nunc parta vera est palma, nunc meas laudo manus*; Now I have got an honourable victory, now I praise my handy work; but they in whom conscience beareth

* Chron. ii. c. 39.

† Senec. in Thy.

stroke are far otherwise addicted, and shall be hereafter otherwise rewarded. Nay, even in their life-time do they possess the ensigns of authority and dignity, and by good right may they challenge many special favours, immunities, and indulgences. Constantine, the Emperor, gave to the professors of the imperial laws full and perfect freedom from all collateral charges, taxes, and other burdens of the commonweal*; and he decreed also, that certain yearly pensions should be paid unto them out of the treasury†: and the Emperor Valentine would have them, which by the space of twenty years were professors of the law, to be illustrated by the name of *Comites*, a name of excellent dignity ‡. Many other privileges and benefits are mentioned in the civil law, which belong as well to students as to professors, and hereupon had that saying his original.

* L. medic. l. 6. de profes. & medi.

† D. L. medicos.

‡ L. unica & rubri. de profes. qui in urbe Constantinopol. docent ex lege meruerunt. Comit. lib. 12, c. tit. 15.

Dat Galenus opes, dat sanctio Justiniana :

*Ex aliis paleas, ex istis collige grana *.*

Neither hath England been unkind or strait-handed to men of that coat and calling; for in old time, as I find in M. Plowden, who was credibly informed thereof, there were four reporters of the cases of law, which were chosen men, and had a yearly stipend for their pains and travail therein, paid by the king†. But some will say that God forbiddeth us to contend. Who denieth that? but he doth not forbid to judge and determine controversies; and there is great difference between judging and contending: for though God do forbid thee to beat a poor travelling man; yet he doth not forbid thee to bind up his wound when he is hurt and maimed of others. So though he do greatly abhor the hatred, rancor, malice, and disagreement of men, yet he is well pleased and contented that such pernicious and conta-

* Angel, Aretin in § proem. institut.

† Plowd. in Epi. a les estudents de le common ley.

gious diseases should be cured. Let him that condemneth the fault approve the remedy. One man rageth with a burning desire of revenge; another conveyeth to himself another man's goods by craft, whom when charity and duty cannot bring into the right way, his disloyal dealing must be repressed by the severity of judges. Moses, David, Solomon, committed no sin when they caused wicked men to be rigorously punished: and though Christ do condemn a quarrelous and revengeful person, yet he leaveth to the judges their authority, whether they rule and order causes by the laws and customs of nations, or by the law of Moses, Joseph, Daniel, Naaman, the Centurion, did govern common-weals by the laws of the heathen. Surely the politic laws of kings and magistrates are greatly to be heeded and regarded, which Christ himself allowed when he paid tribute to Cæsar. And the profession and practice of the knowledge of law is warranted by the example of great men, who would not have borne the names of professors, if the

science had not contained in it singular wit, excellent wisdom, and profitable directions for the whole course of man's life. It is well known that the Camilli, the Curii, the Fabricii, the Fabii, the Claudii, the Scipios, the Crassi, the Julii, the Ciceros, and the Scævolas were singular men and singularly skilled in law. And to give them their proper appellation, were lawyers. These men governed their common-weals, not in the shadow, in darkness, or corners, as the Grecians did, but in the clear light of the sun and in the face of the world, using experience as a pilot against the boisterous and turbulent affections of the people. And, therefore, Virgil when he distributeth several sciences to several countries, appropriateth the science of governing common - weals to the Romans*.

*Tu regere imperio populos Romane memento,
Parcere subjectis & debellare superbos.*

Mind thou, O Roman men, by law to guide,
To spare the meek and over-master pride.

* Vir. Æneid. 6.

But some account it a matter of too great curiosity, that the laws, which should be plain and manifest to all, should be reduced to an art obscured with difficult cases, shadowed with conceited terms, and, as it were, covered with clouds, and wrapped in darkness: to whom I answer, that it is very expedient, that there should be a certain art and science of the law, general rules and precepts, and convenient discourses. For the particular things which do fall under the observation of law are infinite, and the weakness of man's memory cannot tolerate the multitude of particular laws: and therefore it is convenient that that which we call *æquum bonum*, which, in plain terms, is nothing else but perfect reason, should be comprehended and delivered in certain general precepts; and Plato alledgeth this for a reason*, because it is necessary that there should be *Regia disciplina*, a princely science, for he suiteth it with that name, which may, by a general censure, order

*. Plat. in Polit.

and dispose of all things without regard of every particular circumstance. For the certain knowledge of matters it is good that the law should be bounded by certain rules and limits: for a man could not certainly know what were his own and what another man's, unless the law should, as it were by finger, point and shew unto him what, when, and how it were his, and, therefore, true is that saying of Cicero, *Omnia incerta sunt cum a jure discessum est* *. If you depart from law there is no certain state of any thing. And his opinion is, in another place †, that our inheritance rather cometh to us by the law, than by our ancestors: for though they do give it, or leave it unto us, yet it is the law which doth settle it in us, and doth preserve the possession thereof free and inviolate unto us. Wherefore it is to good purpose that the law should be definite in itself, and should consist of certain conclusions which should be as the lists and

* Cicero, lib. ix. Epist. famil.

† Cicero, in ora. pro Cæcin.

periods of the science, by the contemplation of which, a man may be instructed and sufficiently furnished for particular causes and events: for the particular case lieth as it were embowelled, and is implicatively contained in the general learning; and there is nothing in the law which may not be reduced unto some universal *theorem*, which may easily be conceived and remembered, because it is general *. And though the professors of the law do make particular arguments of special causes, and do admire examples or cases to the illustrating of that which they do principally handle, yet the law itself is comprised within certain rules. Neither ought it to trouble us, that the law books are so huge, and large, and that there is such an ocean of reports, and such a perplexed confusion of opinions, because the science itself is short and easy to one that is diligent, according to that saying: *Industriæ omnia serva fiunt*, All things are servants to diligence, or come at her command, and arts

* Marcell. 2. fi. de jur. & fact. ignor.

are not to be esteemed by the greatness or smallness of the books, but the goodness of their rules. And though the laws which do bind mens lives and manners ought to be understood of all, that their prescript being known, men may decline from that which is forbidden, and follow that which is commanded: yet that may be done either by their own means, or by the means of others: and if a man's brain be no fit mould for the law, let another man's mouth be his teacher. Hence cometh the name of Counsellor, because in doubtful causes he may resolve and give counsel. Whereby appeareth as well the necessity, as the excellent use of the calling: for what can be more convenient or of better opportunity, than that a man of experience should shew the way to one that is ignorant. It is therefore expedient that there should be laws written, and that such laws should not be altered without urgent occasion: for it is a fond part to strive against the course and stream of laws, and customs received. A great question it hath been heretofore, whether common-weals were

better governed by written laws, or by the present and voluntary conceit of the magistrate: this matter, because religion itself hath committed civil duties to the wisdom and ordering of man, ought to be measured by the examples of wise governors and by popular sense. What good common-weal hath there ever been without written laws, which have been used by the Egyptians, Cretensians, Athenians, Romans, and Jews. The writing or the engraving of laws in tables is a principal cause of the certainty of the same, and without certainty, it should be of small credit: for what authority or force should it have, if it did always change like the moon, or like Ver-tumnus: but when causes are decided by the opinion and will of the magistrate, the power of government may be in the hands of such as be unskilful or wicked, and so either for want of skill, or conscience, justice may fail of her course. How often might the pretence and shew of justice beguile us? how often might justice be perverted by favour or malice? But if laws were not general, and should not

sometimes restrain magistrates and governors, great inconvenience would ensue: even as great as happened in Athens by the violent domination of the thirty tyrants, who, when they had cancelled and disannulled the laws, did exercise a common butchery and slaughter of good men. Wherefore, as in dangerous tempests the ship is not rashly committed to the winds: but there is need of a skilful pilot by cunning and carefulness to govern: so the wavering and passionate mind of the magistrate, must be ballasted and weighed down by law, lest his own private affections do drive him from doing justice as from the haven. Aristotle affirmeth, that God ruleth that common-weal which is governed by a written law, because the laws are the champions and defenders of convenient liberty, than which there is nothing more pleasant in this life; for what thing can be more happy, than to be free from the fear of injury, and safely to enjoy the society of men; and therefore he would not have the government of the common-weal to be committed to any one man,

though very virtuous, without the regimen and direction of the laws. Neither let any man say, that I do sinisterly judge of the natures and dispositions of men, in that I account no man of so approved and special virtue, and fidelity, that the managing of common affairs may be offered unto him to order them at his will and pleasure without the appointment and warrant of laws: surely I could wish that every governor were a Numa. But yet I would have the law to be joined with the magistrate in the act of government. Neither do I fancy or figure in my mind any happier common-weal, than such as may accord with the tenor and progress of human affairs. If a man should imagine that the authority of government were in the hands of the Stoics, such as would neither be moved by hatred nor favour, though they in other respects were very unfit to govern, how shall their humours be satisfied, who had rather be governed by written laws, than by upright magistrates? for such is the madness and frowardness of some, that they will not be contented with the equity

and faithful dealing of the judges, but will still contend by the rigour and dint of law, and will try all extremity, being oftentimes more at jars and odds with the judges than with the adverse party: here the authority of judges will be weak, unless the laws publicly received do strengthen it: so that in the written laws there is not only a safeguard for innocency against injury, but also for the magistrate against the importunity of the people. But as wayfaring men whilst they travel are not afraid of going astray, when Mercury's image doth point out unto them the way that they are to go: so good men when a certain law is proposed unto them, when by it they know what every man ought to perform, what to avoid, they are secured and do wholly repose themselves in the protection of laws. To the intent that the Hebrews might well agree, and have good order amongst themselves, God did enact and establish certain laws, that they might judge by prescript, and rule, lest the law being ambiguous might procure dissensions. And other people and nations have either by the tyran-

mous domination of magistrates, or the outrageous discord of the people, been forced to receive laws as the square and measure of their actions. In the City of Athens, when there was a continual debate about the difficult points of the law then in force, there arose three factions of men, not of the worst sort, but yet not well agreeing in matters of state: the city by this means being greatly molested, and the hearts of men being edged and exasperated by the festered sore and canker-worm of contention, the government was committed to Solon: he surveying by depth of judgment the weak and impuissant estate of the city, made laws, whereby peace and contentment were restored. And when he saw that these laws were the sinews of the good estate of the city, he determined that whosoever should hold any judicial place, should in precise terms take oath that he would judge according to the laws. This was also the cause why the Romans did fly to a written law: the magistrates did arrogate and assume too much to themselves; the people did exceedingly grudge and

murmur that their honest liberty was impeached by the manner of their ruling, and the best men were at variance in matters of law: so that it was thought meet that some equal laws should be in force, whereby the rashness of the people, and the violence of the magistrates might be moderated: for this cause the laws called the twelve tables were prescribed to the city, which yoke was willingly received, because without laws they knew their common-weal could not prosper, nor continue. And as there ought to be a certain form of laws, so these laws ought not to be altered or abrogated without great occasion, and the evident advantage of the common-weal. There was a law amongst them of Locros, that whosoever would make a motion or invective against any received law, should thereof deliver his mind, having an halter about his neck, and if it were agreed by the assembly, that the thing which he endeavoured to persuade were for the good of the common-weal, the man was safe, and received commendation; but if it were disallowed, and rejected as an un-

profitable admonition, he was straightway hanged, and received death as the guerdon of his innovation. And in Athens there were a kind of men called νομοφυλακες, who in all public meetings did sit amongst the chief magistrates, and did put them in mind not to decree any thing against the laws in force. Thus it is evident that both the making and maintaining of laws is necessary. And it is rightly said of Cicero, that the law is as necessary for the government of a state, as the soul and mind is for the preservation of the body*: this, saith he, is the bond of all dignities and degrees which are in the common-weal, this is the foundation of liberty, the fountain of equity. The will, counsel, and decree of the city is contained in the laws, as the body can do nothing without the soul; so a city without law cannot use her actions, power, or authority. The magistrates are the ministers of laws, the judges are interpreters, the people are the servants, that they may have true liberty.

* In orat. pro Cluentio.

The law is thus defined by Cicero, *Summa ratio insita à naturâ, quæ jubeat ea quæ facienda sunt, prohibeatque contraria**, A principal reason ingrafted in us by nature, which commandeth the things that are to be done, and forbiddeth the contrary: and all the particular and several laws of divers nations are but the branches of this law: for the laws be certain and clear intelligences, and rules, whereby the mind is addressed to pursue that which is good, and to eschew the contrary: and they offer to the mind the forms and ideas of virtue and dishonesty. So that in the sacred precepts of law, as in a chrystal glass, a man may perceive what he may do with praise, what he cannot do without infamy: for the common places, which be handled by divers, of common duties, of that which is truly good, of that which is perfect happiness, of the best estate of a common-weal, do not so sufficiently qualify and instruct the understanding, as the law itself. But here I shall be crossed by another objec-

* 3. lib. 1. de legi.

tion, that great and tedious are the labours which are to be sustained in the study of the law. Surely there is nothing of weight or worth which may be compassed without pain and travail, and yet if the pain be compared and balanced with the profit, it is but as a few drops of hail to a whole shower of mauna. What would not a to-wardly man do? what would he not undertake by his wisdom and weariness, to keep all danger from the bodies, heads, and lives of the innocent; to preserve his memory from oblivion and silence; to be of great account amongst the greatest; to attain to that knowledge, which is the highest of all human arts and sciences? and though it were as hard a matter for a young gentleman to gain the knowledge of the law, as it was for Phaeton to ascend unto the chariot of the sun, who, ere he could accomplish that, was to pass through uncouth ways, and by the ghastly forms of deformed creatures, by the terrible signs of the bull, the lion, and the scorpion*, though

* Ovid. *Metamorph.*

(I say) a student ought to have all the law perfect, and to pass through a multitude of cases, judgments, statutes, arguments, treatises, comments, questions, diversities, expositions, customs of courts, pleadings, moots, readings, and such like : yet since there is no art nor science by which the common-weal receiveth so great benefit : since there is no course of life, no time of age, no estate of men, which can either flourish or be without the safeguard of laws; and since the difficulty of the science is rewarded by the dignity, credit, and ample fortune which belongeth unto it: the hope of them which employ themselves in this study ought not to wax faint, nor their minds to be daunted with the labour and pain, which all arts require ; but they ought to be incited and allured to proceed in their studies by the excellent and honourable rewards of the same.



CHAP. II.

**OF THE GOOD QUALITIES WHEREWITH THE
STUDENT OF THE LAW OUGHT TO BE
FURNISHED.**

BECAUSE many apply themselves to the study of the law without deliberate consideration of their qualities and sufficiency, so that many times they find not that contentment which otherwise they might enjoy. It is very convenient ~~that~~ they should know what qualities are requisite in him who is to employ his time in the study of the law: for, as Aristotle sayeth, Rules and precepts have not force in all; but the mind is to be decked with good gifts, that it may take joy in things that be truly good, and abhor the con-

trary*. The first and chief thing that I do require in him is, to have the true knowledge and fear of God, without which his other knowledge is but as a sword in the hand of a frantic person: and where the light of truth is not, there is a dark and ten-fold mist about the mind. But where God is not, there is no truth, there is no light, there is no law. The soul and senses are but the instruments of his will, which he bindeth and looseth at his pleasure. And if they turn from beholding him to the contemplation of any art and science whatsoever, surely they effect nothing but their own destruction. I know this is no pleasant sound to some dainty ears, who cannot tolerate any naming or mentioning of religion, which the Pagans, whom they make as precedents of their prophane manners did not only regard, but in the very front and beginning of their laws (such was their reverence) they prefixed a precept and caveat for the observation and keeping of holy rites in a

* Aristot. lib. 10. Ethico. ad Nichomach.

regardful manner: *Ad deos adeunto caste, pietatem adhibento: qui secus faxit, deus ipse vindex erit.* Let them go to the worship of God with a chaste mind: let them use reverence: God will be the revenger of him that doth otherwise*. Some perhaps had rather hear a curious discourse handled by some astrologer, whereby they might have certain notice and understanding what complexion and constellation is most fit to enter into the study of the law: with such dregs they would have their mind satisfied. They, perhaps, will believe (for what is more credulous than fancy) that they which are born under Jupiter are not fit for the study of the law, as Cocles teacheth them†, that they which are born under Mercury are of quick conceit, but quickly unconceited, soon ripe and soon rotten; especially if Mars be joined with Mercury in the constellation, as it happened according to the suggestion of some in Hermogenes the sophist, who writ of sophistry in his youth like a grave

* Leg. 12. tabular. c. 1.

† Cocles in Physiognom.

old man, and was in his old age as a trifling boy. But they which are born under Saturn are said to be more dull in the beginning, but in process of time of more sound and deep knowledge than others: surely I am not of opinion that the soul and the powers thereof are subject to the sway and motion of the planets. If I should think that it were a substance flowing from the body, or so mingled with it that it might be accounted a kind of blood, as some philosophers grossly conceived, this might seem unto me probable*. But I am fully and immoveably persuaded that the soul cometh from above into this strange matter, whereof the body is compacted, and is of an incorporeal nature, which is not subject to the impression of the senses. For when sickness affecteth the body, the soul is sound; and when the body is racked, the mind is free. Neither is it to be marvelled at, that it conformeth not itself to the change of the body, because some material parts of the body are not al-

* Cicer. in Tusc. quest,

ways partakers of the change. Let a man go abroad in the most cold and freezing weather, yet his eyes will never be frozen; let him stand by the most scorching fire, yet they will never feel heat. The strange and different substance of them from the other parts of the body, I take to be the cause. Now the planets do work only upon corporal things, for their influence is of the same sort as the attractive force of the adamant or the geat, which cannot work but upon material things: and therefore I may well conclude, that the stars do not qualify the mind but the body only, which, being a cottage of clay, must needs bear the wind and weather, the alteration and impression of the planets. Wherefore let not any man who aimeth at the knowledge of the law as the mark of his desire, make any estimation of these physiognomical fictions: let him not go to the house of Mars, nor to the sphere of Mercury for knowledge. *Si quis indiget sapientiâ, postulet à domino.* If any lack wisdom, let him request it at the hands of God*.

* Jacob. c. 1.

He must likewise observe that the way to the height of knowledge is by humility's gate. Let not the increase of his skill make his mind to increase and swell after the manner of lofty spirited men, who, when they know nothing, yet would seem not to be ignorant of any thing. Every auditor must be willing to hear *Oportet discentem credere*, saith Aristotle*, who, though he was a man of singular knowledge, yet gave example of great modesty by this censure, *Maxima pars eorum quæ scimus est minima eorum quæ ignoramus*, The greatest part of the things which we know, will countervail but the least part of the things which we know not: as if a man should compare one hundred to one. But none do more boast of knowledge than the ignorant, as nothing soundeth more than empty vessels: and they nourishing in their minds a haughty and ample opinion of their supposed ability, are so bewitched with self love, that they think they sucked eloquence with their nurses

* In Analytic. posterior.

milk, that the bees which are feigned to sit upon Plato's lips did fly to their lips whilst that they were dreaming in the cradle: that they were able to teach old men before they had teeth: and triumphing in this conceit, they admire themselves and disdain others, advancing their own doings and discommending the fruitful labours of other men, like apes loving their deformed children, and like fantastic pigmalions wooing their own devices. If any thing be spoken of them sometimes clerkly, and accutely as they think, they make an inward applause unto themselves, and cherish their hearts with this acclamation, *fasete! laute! lepide! nihil supra!* but if any thing be spoken of others aptly and sensibly, they straightway infer, *quanto tu melius hoc invenisses Thraso!* But a discreet and advised man will judge none to be so mean, but that he may learn something of him: for though he know more than others, yet he must think that others know somewhat which he knoweth not. The best and the most grave man, saith Cicero, will confess that he is ignorant of

many things*. And Solon was not ashamed to say, that in his old age he was a learner†. And Julianus the lawyer said, that though he had one foot in the grave, yet he would have another in the school‡. The next thing I require in a student is temperance, which I do not take so strictly as Aristotle doth, who defineth it to be a restraint from corporal pleasures, which are objected to the sense of feeling§, but would have it so largely understood as Plato||, Cicero¶, and now of late time, Scaliger**, and D. Gentilis have taken it to be, a restraint of the mind from all voluptuousness and lust, as, namely, from covetousness, excess of diet, wantonness, and all other unlawful delights. A student must in his diet be temperate and ab-

* Cicer. Tusculana. 2.

† Cicer. in Catone major.

‡ L. apud Julianum de fide commissis liberal. in p.

§ Aristoteles lib. Nicomachior. 2 and 3. and in lib. magnor. morali.

|| Plat. in Convivi.

¶ Cicer. lib. 1. officior.

** Scalig. lib. 3. poetic. Alberic. Gentil. lib. de leg. 3. c. 13.

stinent, for as Musonius saith, continency in diet is the step to wisdom *. A fat and full belly yieldeth nothing to a man but gross spirits, by which the sharp edge of the mind is dulled and refracted, and too much meat cast into the stomach doth engender nothing but crudity and diseases. This measure must be used in our diet, that no more be taken than will suffice. Seneca prescribeth a good rule †, *famem famem finiat*, Let hunger end hunger; which is nothing else, in plain terms, but that a man should rise with an appetite, being rather satisfied than filled. Yet he that feedeth more plenteously is not to be reproved if his body do stand in need of more copious nourishment; and a man must not so abstain, that the functions and duties of the mind and body be hindered. Good and moderate nourishment doth quicken the spirits, and they do give strength to the brain; but that which is unwholesome and immoderate doth stop, thicken, confound, and destroy them. As

* Stobæus de temperantiâ.

† Senec. epistol 111.

in diet, so in other things, it is good for a student to have the rule and mastery of his mind and appetite, neither so to let slip the reins to his desire that he will for any commodious respect bring himself to shame and obloquy, and for a present advantage incur a perpetual discredit. Plato hath a sentence worthy of observation *, *Et dicere & facere ea quæ decent ad sobritum & prudentem hominem tantum pertinet*, To say and do the things that are comely, belongeth only to a sober and wise man. That example of rudeness used by certain Florentine ambassadors is to be avoided. Jovius reporteth it †: They were sent as ambassadors to Charles the Fifth, and Pope Clement the Seventh, staying at Bnomia, and being merchants, carried with them (such was their extreme covetousness) certain wares to make gain of, thinking they should be free from custom, as going under the name of ambassadors necessities. But this being perceived by the two great estates, moved the emperor to laughter,

* Plato in Timæ.

† Jovi. lib. 28.

and the pope to anger, who was a citizen of Florence. The legates departed with infamy, which they well deserved for abusing so honourable a calling by such base indignity, which may be a warning to all to prefer their credit before their greedy desires.

Diligence in the pursuing of any study is of great weight and moment, and in the study of the law it hath principal force and effect, for the cases are many in number which must be read, remembered, and applied, which cannot be compassed but by extreme diligence. And whereas some pretending a lumpish idleness, would have the law measured with narrow limits, and would have the multitude of volumes, cases, rules, and diversities abridged and made less, surely they give large testimony of their great desire of ease. But ease is a very bad medicine for difficulty, and their pretence is wholly repugnant to reason, yea to possibility. They that would have few laws, must procure that there be few causes, and little business, which it is not possible for any to bring to

pass. If it were possible for these faint students to take away the infinite and the innumerable affairs and actions of men, then that which they require might sort to good effect. But that lieth not in their power, and therefore they should surcease their sluggish surmise. For this cause Ludovicus Vives is justly reprehended of Albericus Gentilis, in that he held that all things might be finished by few laws; whom Gentilis affirmeth, to fight against common experience*. For if many contentions or controversies should happen, which none can bridle or prevent, if the law should not handle, discuss, and determine them all, the law should do injury, and it should not be the hand-maid of justice, it should not *suum cuique tribuere*. So that in the student's mind this resolution must be fixed, not to sink under the burden, but with all convenient industry to follow his study, never to be weary of pains, nor to slacken his endeavour,

* Albericus Gentilis dialogo primo de juris interpretibus.

since nothing of price and account is purchased without great labour, by which he may attain to the knowledge of many excellent things more worthy of admiration than praise. Neither is it seemly to pretend weakness of body, and tenderness of complexion, when health and strength do well serve, and may well be employed in study. Cicero's body was neither of iron, nor of oak, yet he was not broken, nor in manner altered by his continual night-watchings, noon-sittings, and morning-risings ; by his many labours, contemplations, and studies, by the great charge of his household, by the weighty care of the common-weal, by writing many books, and epistles without number, as Cardanus well observeth*. And why should any man despair to do that which another hath done, especially having the like disposition of mind, the like faculties and means to attain to knowledge, and the like desire. This diligence doth chiefly shew itself in reading and hearing. It is not fit for him that heareth or readeth,

* Lib. 4. de sanitate tuend. c. 16.

to have a mind wavering from the purpose, and as it were going on pilgrimage. A man is then said to float in fancy, and to wander in thought, when he doth not bend his mind to that which is handled, and when he is amongst his books in body, but not in mind, or when he is present at some reading, and doth not shew himself attentive, but doth number the tiles of the house, or buildeth in the air, or doth nothing less than that which he should do; but the force of the mind must bend itself to that thing only which is to be conceived. For the power of our mind and understanding is more strong when it is united, than when it is dispersed, and distracted into many parts.

Pluribus intentus minor est ad singula sensus.

But as these things forenamed are of great consequence and value to the student, so wisdom that rare and excellent virtue of the mind is of great importance, which I do rather exact, than require in a student, for without it nothing can be done decently or

perfectly; and surely to a student of the law it doth specially appertain, for it doth consist in the cunning discerning of the truth of every thing *. And a student ought not only well to deliver things conceived, but well to judge of them, and in this part standeth the best part of a lawyer. It is the property of a wise man most sharply to perceive what is true, what is false in every cause and controversy, not to be deceived nor inveigled, not to be unconstant in opinion, nor ignorant in the circumstances of things. The ordinary mean to attain to wisdom, is to use time and diligence sufficient for the consideration of things, to hear reasons on both sides contending in his mind as it were armed and professed enemies, not to judge of any thing rashly or hastily, nor to give a slight censure of weighty matters. For as Fabius sayeth in Livy †. *Omnia non properanti clara certa que fiunt, festinatio improvida ac cæca est*, all things, are plain and certain to him that is not rash nor heady.

* Cicer. Offic. lib. 1.

† Livius l. 22.

Haste is improvident, and blind, which is therefore rightly termed of Plato, *Noverca Scientiæ*, the stepdame of knowledge *. And the Ætolian magistrate said well, † That there is nothing so great an enemy to good advice, as haste, which bringeth pennance swiftly, but warning too late, and without profit, because counsel hastily given cannot be revoked, neither can the thing which is disordered by bad advice, be entirely restored or brought into order again. But where a man taketh time sufficient, he cannot be said to do any thing rashly. Wherefore not unfitly hath it been defined by some to be the knowledge of the opportunity of doing things aright, and the cause that all things be well done‡, and it hath not only a stroke in worldly affairs, but even in matters of religion; for by it a man may be so directed, that he may neither decline to superstition, nor to that which is contrary unto it, namely, impiety or atheism. And it is the level or compass of all other virtues in the accidents

* Plato in politic.

† Livius. l. 31.

‡ Diogen. Laer. in vit. Platonis. Clcer. lib. 1. officior.

and affairs of this life. It will shew the times and measure of boldness and audacity, lest it turn to rashness and impudence. It will so order temperance the mother of order, that it may not be accounted rudeness or incivility. It will guide justice which governeth all things, lest it turns to cruelty; nay it will moderate itself, lest it be termed craft or deceit. By these effects the student may easily perceive, how necessary it will be unto him.

The qualities above mentioned, do so directly respect a student, that they may be numbered in the rank either of adjuments, or ornaments. One thing yet remaineth, which is, to be placed and ranged amongst the ornaments only, being a mere ornament, yet it doth as much adorn, as the other doth help; and that is curtesy or mildness, which doth as much deck and illustrate any gentleman, as the diamond doth the gold to which it is fastened, or as the chain of the neck doth give a lustre to the bravery of the other parts, it setteth in order, garnisheth and graceth the other gifts of the mind, without which they

should be unsavory, and want applause: I distinguish it from civility called *Urbantitas*, and *δουρατελία*, or that is only to be seen in public meetings and assemblies: but this may shew itself within a man's private walls, or chamber, and may be used betwixt man and man. Most loathsome and deformed are the manners of the stoics, who whilst in sourness of mind they seek to overcome man's nature, do exceed it, and of men they become beasts. And such manners have disgraced men of excellent ability. Coriolanus was by nature a stoic, and his roughness of manners is justly and worthily reproved by Dionys. Halicarnasseus*. Cato was both, by nature, and profession; whom, for his bitter austerity, Erasmus condemneth†. And surely I think that such rugged behaviour doth relish harshly, and is sometimes unpleasant to them who by natural inclination do favour it. Hear therefore a stoic dispraising a stoic, Cn. Piso (saith Seneca): *fuit a multis vitiis integer, sed pravus, &c.*

* Dionys. Halicarnass. lib. 8.

† Erasmus in *Encom. morie.*

cui placebat pro constantia rigor *. Cn. Piso was free from many faults, but yet a froward man, and was delighted with stiffness of mind instead of constancy. Florus hath noted the currishness of Romulus with a perpetual blot of infamy, *Romulus ob asperitatem morum a Senatu discerptus est* †. Romulus for the roughness of his manners was torn in pieces by the Senate. But mildness is of that sweet and delectable nature, that it pierceth the stony hearts of barbarous people, it affecteth their eyes and ears, it bendeth the most stubborn and insolent spirits, it findeth an easy way amongst swords, it overcometh wrath, and allayeth hatred ‡. This I commend to the student as a principle mean to gain favour, love, and good entreaty.

* Senec. lib. 1. de ira. † Flor. lib. 1. histor.

‡ Valeri. Maxi. lib. 5. c. 1.

CHAP. III.

**OF THE CHOICE WHICH A STUDENT OF THE
LAW OUGHT TO MAKE IN HIS STUDY.**

NOW that we have shewed what qualities are convenient for him, who purposeth to gain knowledge and credit by the study of the law, it remaineth to give him some taste of that course which in pursuing his study he may not unprofitably observe. For though the way were plain, yet to them that know it not, it is hard and difficult. And as the first yoke is to the young steer heavy, not because he is not able to bear it, but because he is unacquainted with the carrying of it, so young students though they be in age and capacity mature and perfect, yet because they adventure upon a new enterprize

whereof they never had trial, they are somewhat troubled at the first : yet in continuance of time, by labour and some direction of veterans in the art, they pierce through the thorny fence or bar of these great difficulties : but here let the student take courage unto him, and when the door is opened, let him not doubt to enter. As he must not neglect time, which is a consuming treasure, so he must make distinct choice of it, lest omitting better opportunities, he do cast himself into the straits of time and necessities, whereby he shall find much incumbrance, and his proceedings shall be crossed by many interruptions. And surely as in all matters of moment, the place where a thing ought to be done is greatly to be regarded : so likewise the time wherein it is to be done. For the turning of all temporal affairs doth depend upon these two things, and these circumstances do either make or mar the substance of our actions. It hath been questioned of divers, whether the morning or the night be more convenient time for the study of the law, which because it is no modern doubt,

but either part hath had favourers and patrons in all ages, and to the end that by some clearness of reason the truth of this matter may appear, I will bestow some pains in the opening of this point.

Marsilius Ficinus a man of excellent learning and judgment doth by five reasons prove that a man should rather rise in the morning to study, than watch in the night.* His first reason is borrowed of the Astrologers, which he doth not greatly urge, because he had small regard of their vain speculations: but admitting what they say to be true, he thus reasoneth: there are three planets very favourable to students in the course of their studies, *Sol*, *Venus*, and *Mercury*, all which in the night are most remote from our hemisphere, and go into the twelfth house of the heavens, which is called the prison, toward the west. His second reason is this. The spirits of our bodies do follow the state and disposition of the air. Now in the morning, when the sun riseth, the air is subti-

* Marsilius Ficinus, lib. de vita sana, c. 7.

lized, and made thin, pure, and free from all gross vapours. But in the night time it is thickened, and corrupted with contagious exhalations, which possessing the senses, do pierce into the brain. Thirdly, the day was made at the first, for labour, and the night for rest, (and therefore it is said in the 104th Psalm, *Thou makest darkness and it is night, wherein all the beasts of the forest creep forth, when the sun riseth they retire, and couch in their dens. Then goeth man forth to his labour, until the evening.*) And whilst the sun holdeth and containeth his race in our hemisphere, with his beams he doth open the pores and passages of our bodies, and from the center to the circumference of the same, he doth enlarge the humours and the spirits which maketh us more apt to labour and study: but when he departeth from us then all these things are bound and straitened, and then we are driven and provoked to sleep. Fourthly, it is very healthful unto us to use labour or study in the morning, which if it should be in the night the spirits being greatly wasted and consumed

by the motion in the day time, the body becometh weak, and so is utterly unfit for any kind of labour. And he that giveth himself at that time to study, causeth the spirits to fly up into the head, and they being so distracted, cannot yield sufficient service either to the head or to the stomach. Fifthly, if a man study soon after supper, the nourishment is resolved into gross vapours which do fill the body and are very noisome obstupatives to the senses. For the meat being destitute of heat and spirit, doth wax raw and doth putrify in the stomach. So that the brain is offended and our study greatly hindered and impeached. It may be added, for a sixth reason, if any thing may be added to Ficinus. The spirits wherein all our agility and dexterity doth consist, by which the brain doth work, are together with the other parts of the body refreshed and strengthened. So that in the morning they must needs be more serviceable than at night. Seventhly, The fancy or imaginative part of the soul which helpeth greatly in study, and principally in the study of

the law, is in the night-time confounded and obscured. Lastly, the body in the night-time waxeth more dull, so that the mind cannot use it as a convenient instrument. For when the stomach is full and stuffed with meat, the thick air being round about us, stopping the pores, the great store and abundance of humours is carried, as Aristotle saith*, to the head, where it sticketh for a time, and layeth as it were a lump of lead upon the brain, which maketh us drowsy and prone to sleep; then it descendeth by steps or degrees, and coming into the other parts doth engender sleep. And it is the opinion of a learned physician†, that the nightly study is unseasonable, and that it wearieth and weakeneth students, making them lean and exhausting their bodies. For by late watchings their vital spirits through too much intention are weakened, and their native humidity dried up. Demosthenes did study much by candle-light, and therefore

* Lib. de somno & vigil. c. 3.

† Lemnius lib. 1. de complection. c. 9.

his orations were said to smell of the lamp: but he did not begin to study till the first entrance of the morning, and herein he did endeavour to excel every man. But whosoever will follow Demosthenes in this, had need to be well advised of the strength and constitution of his body and to examine

Quid valeant humeri ferre, & quid ferre recusent.

For nature must not be oppressed, but measure and mean must be used, lest the stomach being made by too much fatigue unable to digest the meat received, the pores of the body be clean worn out and extinguished. The whole senate of physicians do call the morning hours, the golden hours, in regard that the body is then in best temper. This may suffice to persuade, that the morning is more fit for all kind of study in general, and by consequent for the study of the law. It hath been proved by probable reasons, and by authority of wise men. If this will not serve, hear the voice of wisdom herself. *I love them that love me, and they that seek*

me early shall find me *. I have dwelt the longer on this question, because it is very expedient for a student, to know the best time of his study, which if it be used in season, may prosper, and take good effect, otherwise his labour may be unprofitable. God (saith Solomon) hath made all things good in their time †. And Ecclesiasticus would have every man to observe time ‡. This therefore I will no longer handle, being a matter plain, but will satisfy the student in other difficulties, which are more frequent and doubtful; and are occasions, that many which do enter into this study do break off their course, and bid the law farewell. The books of law, say they, are not pleasant to read, the words or terms are harsh and obscure, the stile no whit delightful, the method none at all. It is a science void of all proper definitions, artificial divisions, and formal reasons. To answer this cavil, (for I cannot blanch it whiter) I will use a two-

* Prover. c. 8. ver. 17.

† Ecclesi. c. 3.

‡ Ecclesi. c. 4.

fold manner of confirmation, and will shew that either the law hath those things which they deny unto it, or if it do want them, it needeth them not. The writings of wise and grave common-weal men learned in the law are not to be censured by Gram-marians, and Rhetoricians, who make a gallant gloss of *Clytemnestra's mules*, Alexander's horse, and such frivolous vanities. For their study was far different, being for the general good and commodious government of the common-weal. And if any man reprove them for want of sharpness of invention, and fineness of wit, let him be well advised, and consider the substance of their works, and he shall find, that they carried *Mercury* in their brain, and not on their tongue, and that they wanted not wisdom, though they were defective in rhetoric, which not to have joined with wisdom, is so far from fault, that if they had conjoined it they had committed a fault, for who will not dispraise and detest curled hair, and painting of the face in an aged matron. And in their writings wherein their chief purpose and ad-

dress was, to search out the truth of doubtful matters, and to deliver it to posterity, there could be nothing worse, than a curious kind of stile, which is used commonly of them that seek to flatter and to dissemble, and to bewitch with a familiar kind of persuasion the common people, with whom such flowers are of more account, then substantial fruit. All kind of things is not convenient for all sorts of men. Rhetoric I grant is a pleasant thing, and full of delight. But in professors of gravity, neither comely nor commendable. Who would not allow a tripping gate, nimble hands, glancing eyes in a stage-player or dancer; but in an ancient citizen, or grave philosopher, who would not dislike them, blame them, abhor them. If we see a young damsel pleasant and talkative, we do not reprove it in her, but if we find that in a matron, we loath and condemn it. And truly from the purpose and practice of grave men, there should be nothing more different, than that which savoureth of too much daintiness or curiosity. Alcibiades's shoe is not fit for Socrates's

foot, and it is not convenient for grave men to celebrate the feast of Bacchus in the temple of Vesta : there is great distance betwixt the stile of the courtier, and the professor of the law ; for if the courtier should neglect delicate speech, he should be no good courtier ; so if the professor of the law should affect it, he should not speak like a lawyer. If Pythagoras could have lived without meat, he would not have eaten so much as herbs, and if he could have expressed his meaning by signs or gesture, or by any other mean than speech, he would never have spoken, so loath was he to offend in superfluity : therefore the writers of the law are not to be reprov'd for doing that, which if they had done they might justly have been reprov'd. Cicero when he treateth of matters of law, speaketh like a lawyer, and a lawyer must speak as the law doth speak ; therefore Baro.* saith well, the writers of the law would not have left to posterity, so many law-books, if they had affected a choice

* In Epist. ad Com. Just.

phrase of speech. And surely if when the Latin tongue did most flourish, the Cæsars and Cicerò himself, did not use any gorgeous and filed kind of speech in matters of law, shall we desire it of Bartolus, Bracton, Britton, and Glanvill, when eloquence was in the eclipse or wane, and exceedingly decayed, Varro saith, that by the diverse mixtures of people and nations, old words grow out of use, and are changed, and new do take place*: how can it then be, but that the common-law should have harsh, obscure, difficult, and strange terms by the commixtion of the several languages of the Saxons, Danes, and Normans, the authors of the same. Polybius reporteth, that there was such alteration of the Roman language soon after the expulsion of their king, until his time, that they which were most skilful of antiquity could hardly understand a great part of the words† which doubtless was a great impeachment to learning and knowledge.

* Varro lib. 4. de lingua latina.

† Polybius lib. 3. histor.

If the received words of the law should be altered, it may well be presumed that many ancient books of the civil law, and the old year books would in short time be hardly understood. And I am surely persuaded, that if the ancient terms of the law should be changed for more polite and familiar novelties, the new terms would be nothing so emphatical and significant as the old. The words of the law may be compared to certain images called *Sileni Alcibiadis*, whose outward feature was deformed and ugly, but within they were full of jewels and precious stones: so the words of the law, though they be rude in sound, yet are they pregnant in sense. But some perhaps will say mine ears cannot tolerate such an unpleasant sound, and so confused a style: O, delicate fellow! when you go to the theatre or dancing-school repose yourself wholly in your ears, but when you come to hear matters of weight handled and discussed, rest not upon your senses, but upon your mind and understanding. Alcibiades was more moved by the naked speech of Socrates, than by the laboured eloquence

of Pericles : but this Rhetorician will reply : I confess the law to be of itself a reverend and excellent thing : but it would be no whit worse, if it were more finely and politely delivered. Who will deny that which is comely of itself to be made more comely, if other things be added to adorn it ? To answer this briefly and plainly, many things there be to which if you should add any other thing, you should take away their place and beauty. They be of their own nature in so good a state, that you cannot change them, but you must needs make them worse : a tomb or pillar of marble, if it should be painted with any colour, should lose the former grace, and be a great deal worse : and a beautiful face is often disgraced, by a needless ointment, and so it is of other things which of themselves are fair and comely : the thing which is added hideth that which it findeth, and sheweth that which it bringeth : and these things which are handled in the law are not adorned by the varnishing of art, but are obscured by it. And it is not convenient in such a serious matter to dally

with tropes and figures, nor to riot with superabundance of words, nor to flourish with eloquence and diapered phrases : but yet he will further object. Though it do not belong to the professors of the law to speak and write figuratively ; yet surely it behoveth them to speak and write in good congruity, which notwithstanding they do not. I would gladly know what congruity it is which curiosity doth require : The fine Rhetorician will say, *absurda consuetudo dirumpenda est* : the Lawyer, he will say, *usus contra rationem annullandus est*, he will say that it is not Roman Latin, it is most true ; therefore, will he conclude, it is not well spoken, nor congruous ; the argument halteth. The Moscovite will speak of a thing after one sort : the Fleming after another sort will utter the same thing : neither of them speak in Latin, but in their own language : do they not therefore speak right ? Yes, they speak right and congruous in their own language, and so do the lawyers in their own dialect and language proper to their art. Doth any man think that these words,

Bellum, Exul, Sylva, Proscriptio, manus injectio, were unknown to the ancient writers of the law : yet sometime they do not use these, but instead of them they say *Guerra, Banitus, Boscus, Attinctura, Arrestum*. But it is convenient that they should use these latter words, being proper to their art or science. Neither is it meet that they should change them for the words of a strange language. Wherefore Scaliger doth upon good cause dispraise the Grecians, because they do express things merely foreign and external by words of their own idiom : and commendeth the Romans, because they did apply foreign words to foreign matters. * And the common-law being derived from the Normans, and other nations, doth conveniently retain the words of the first inventors. And because amongst lawyers Latin words be used many times in another sense than they are vulgarly and commonly taken in, it is not good to have the interpretation of such words from any other than the lawyers

* Iuli. Scaliger in exercitation.

themselves. And though the Grammarians and Antiquaries do in the etymological interpretation of words excel, yet the writers of the law in the analogical interpretation of such Latin words as do belong to their art, do far surpass them. I do not think any exquisite skill of the Latin tongue to be necessary in a lawyer : but hold it sufficient if he know so much thereof, and in such manner, as the common sort of men, which are conversant in the reading of Latin books. And Plato hath a good saying to this purpose, that these things ought of necessity to be known, whereof if a man should be ignorant, he should be said to be shallow * and superficial. So much, therefore of the Latin tongue ought to be known, as will keep a man free from such reproachful terms. The ancient reporters and handlers of the law whilst they wrote of fines, vouchers, remitters, restitution, releases, and such intricate matters, had no leisure to note the properties and rules of the Latin tongue in Cicero, Pliny, Plautus,

* Plato li. 7. de Legi.

and Varro: they inquired not which was good Latin, but what was good law; but they were wise in their judgments, circumspect in their advice, sharp witted in their arguments, grave in their speech, subtle in their questions, cunning in their resolutions; they were excellently instructed to distinguish of ambiguous things by most witty diversities, to open and to argue hard and enigmatical cases by sound and invincible reasons, to confute that which was false, and confirm that which was true. And whereas they are impeached for the want of good and proper definitions, let me ask of these strict logicians what a definition is; I think they will say that it is a brief and plain declaration of the substance of a thing; and be there none such in the law; surely many; but they will have it to consist of the proper genus, and the proper difference, as they term it, without adding any thing else; but it is sufficient if it express the nature of the thing whereunto it is applied. May not these be admitted for good definitions: a fair is a great market; a market is a little fair; a village

is a multitude of houses ; a county is a multitude of villages. Do not these sufficiently express the nature of a fair, market, village, and county ; yet if they should be tried by the touchstone of the logicians, they would be utterly rejected as not current. Some do spend a whole decade of hours in doing nothing else than seeking out the proper genus and difference of one only thing ; and when they have done, they are scarcely so wise as they were before ; they may say of themselves as Gentilis speaketh of them very fitly : *Confidentia astra petimus, ruimus in præcipitia*.* Their divisions likewise are reproved, because they do not flow from the essence of the thing divided : Yet it is sufficient if they do briefly divide a thing into its particulars. Who can disallow of this division used in the law, whereby all causes are said to be either criminal or pecuniary : none but such as will find a knot in a bulrush. Again, they say their reasons are not artificially concluded ; surely it is not

* Alberic. Gentilis li. 4. de Iur interp.

for any man, unless he be in the schools to tie himself to a precise kind of syllogysmal logic ; But if it go to the end of the controversy, it is sufficient, and that is the opinion of Alciat *. Their method is, amongst other things, reproved, or rather their want of method, which exception wanteth truth. All books written of the law may be reduced to these four heads : either they are historical, as the Year-books of the common law ; and Zasius his counsels in the civil law, in which no method is requisite, but it is sufficient to report the things done, and how they were done : or explanatory, as Mr. Stamford's Treatise of the Prerogative, and the Discourses of divers Glossographers, and commentators in the Civil Law, wherein no strict method can be observed ; for the commentator must needs follow his author every way he goeth : and if there be no method in the one, there cannot justly be any demand of the other. For he that undertaketh to comment, or to confute, must apply

* Alciat. lib. ult. parer. c. ult.

himself wholly to the course of his author, or the adverse party: and therefore Scaliger said very aptly to Cardanus, *Sequor te non quo ducis, sed quo trahis*†: or else they be miscellaneal, and in such there needeth no method, because things of diverse sorts, and not depending the one upon the other, are laid together: and such are the abridgements of the common law, and the Pandects of the civil law: Or else they be monological, being of one certain subject, as Mr. Stamford's book intituled, The Pleas of the Crown, Mr. Lambard's Justice of Peace, whom if any reprove for lack of method, surely his judgment is out of order; and that excellent book of Albericus Gentilis, a civilian *De Legationibus*, than which I have not seen any thing done with more plausible, artificial, and exact method, which as it is very hard for any to imitate, so it were to be wished that he would in some other like treatise equal himself.

† Iul. Scalig. in exercitati.

But yet another objection having more favourers than the former must be answered, which is that the law is uncertain, and that lawyers in their opinions and arguments do greatly differ and dissent. But here the matter is greatly mistaken. For the law itself, which doth consist of agreeable conclusions, and of the judgments, awards and opinions, to which reason and truth have subscribed, is not uncertain, howbeit they which do argue of new questions, and causes never heard of before, or such as for their great difficulty have not yet been decided, do in argument contend amongst themselves : but that which moveth disputation is not the obscurity or doubtful understanding of the law, but the qualities and circumstances of the persons, of the actions, and accidents of the time, the place, the antecedents, and consequents. And though reason be opposed to reason, and circumstance to circumstance, yet the law is never opposed to itself. And if a man will condemn an art, because the professors and practisers are divers in opinion, surely there is no art,

nor science, which will be free from condemnation. Go to the historiographers, who should report the truth of every thing, you shall find them at great odds : Livy against Polybius, Plutarch against Livy, Sigonius against Plutarch, and Xiphilinus the interpreter and abridger of Dio against his author. Dio reporteth a prodigious miracle, which Xiphilinus altereth, setting a new face upon it, and discrediting his author *. Go to the Grammarians, you shall find seven great masters at variance about this one word *Anticomarita* †. Go to the philosophers, there is great dissention and a diametrical repugnance of opinions amongst them : there you shall see the Parepatetics against the Academics, the Epicures against the Stoics, the Cyrenaics against the Cynics, the Nominals against the Reals, the Carpentarians against the Raimists. Go to the school of the Physicians, you shall have the like disagreement ; Galen against Hippocrates, Avenroes against

* Xipiphili. in vita M. Anto. Philoso.

† Eras. li. Colloginor. in Synod. Gramma.

Galen, Avicenna against Avenroes, Paracelsus against them all, and Erastus against him. Will any man now condemn history, grammar, philosophy, and physic : If not, then it is evident, that an art or science is not to be reproved, because the writers thereof do in opinion or argument disagree. No more is the law to be dispraised, but rather to be liked for the variety of opinions in it. For as by the collision or beating together of flint and iron fire doth appear, so the truth is disclosed and made manifest by the conflict of reasons. A man shall more easily and discreetly judge of things (saith Aristotle) if he have heard the reasons on both sides contending like adversaries*. But if some men be more contentious in points of law, than others, that is the fault of the men, but not of the art. The knowledge of the law (saith Cicero) is not litigious, but the ignorance thereof†. And if a man should defer his study of any art, or science, until the wri-

* Aristot. metaphy. Sicor. 2. c. 1.

† Cicer. lib. 2. de Fini.

ters thereof did fully, and unitedly consent, it would be as vain a thing, as if a man should purpose his journey from London to York, but should make a vow not to begin his journey, until all the clocks in London should strike together.

Now that I have removed out of the way all such objections, as might be occasion of impediment, and interruption of the student, I think it not beside the purpose, to prescribe and commend unto him some special writers of the law, in the reading of which, he may with advantage and overplus bestow his pains.

He that frameth himself to the study of the civil law, may very profitably employ his pains in reading of the Code, Novels, and Pandects, which are necessary for the profession. Of the ancient writers I think these are most convenient to be read, Bartolus, Baldus, Paulus de Crasto, Philippus Decius, Alciatus, Zasius. Of the latter writers, Budæus, Duarenus, Cuiacius, Hotomannus, Donellus, and among these, yea above these, him whom I lately named Albericus Gentilis, who by his great industry

hath quickened the dead body, the civil law written by the ancient Civilians, and hath in his learned labours expressed the judgment of a great statesman, the soundness of a deep philosopher, and the skill of a cunning Civilian: learning in him hath shewed all her force, and he is therefore admirable, because he is absolute.

The common law is for the most part contained in all the books called the Annals of the Law or Year-books, all which are to be read, if the student will attain to any depth in the law. In them he shall see notable arguments well worthy of pains and consideration. The two late reporters are Mr. Plowden, and Sir James Dyer, who by a several and distinct kind of discourse, have both laboured to profit posterity. Some humours do more fancy Plowden for his fulness of argument, and plain kind of proof; others do more like Dyer for his strictness and brevity. Plowden may be compared to Demosthenes, and Dyer to Phocion, both excellent men, of whom Plutarch reporteth, that such things as were learnedly, wittily, copiously, and

with admiration dilated, and delivered at large by Demosthenes, were shut up in few words, compendiously recited, and with admiration handled of Phocion.

There be certain ancient writers of the law, namely, Bracton, Britton, and Glanville, whom as it is not unprofitable to read, so to rely upon them is dangerous; for most of that which they do give forth for law, is now antiquated, and abolished: their books are *monumenta adorandæ rubiginis*, which be of more reverence than authority.

Mr. Fortescue in his writing sheweth a sharp judgment, and in this is exquisite and artificial, that where he endeavoureth to be plain, he spareth not to be profound. For he writ to a king, who desired to have intricate things plainly opened.

Mr. Littleton laid a sure foundation of the law, and by his own book hath deserved more praise than many writers of note and name by their ample volumes: out of the great books of the law he gathered the most special cases, which were either generally agreed upon, or by the

court awarded to be law, or else in all ages received for positive rules. For very few there be throughout his whole treatise which may not be signed with one of these three marks; his book doubtless is of such singularity, that Littleton is not now the name of a lawyer, but of the law itself.

Mr. Fitzherbert must needs be commended for great pains, and for well contriving that which was confusedly mingled together in many year books; but he was more beholden to nature than to art; and whilst he laboured to be judicial, he had no precise care of methodical points; but as he was in conceit slow, so he was in conclusion sure; and in the treatises which be of his own penning, he sheweth great judgment, sound reason, much reading, perfect experience, and in the whole conveyance of his discourses giveth sufficient proof, that he sought rather to decide than to devise doubtful questions.

Mr. Brooke is more polite, and by popular and familiar reasons hath gained singular credit, and in the facility and compendious form of abridging cases, he carrieth

away the garland. But where Mr. Fitzherbert is better understood, he profiteth more, and his abridgment hath more sinews, though the other hath more veins; but I am loath to make them counterterms, and therefore leave the judgment thereof to others.

In Mr. Parkin's book be many commendable things, delivered by a ready conceit, and pleasant method: many excellent cases, which savour of great reading, and good experience: his treatise is to young students, acceptable and precious, to whom his very faults and errors be delightful, but it might be wished, that he had written with less sharpness of wit, so he had discoursed with more depth of judgment. For he breaketh the force of weighty points with the shivers of nice diversities, yet many things are to be allowed in him, many to be praised, so that the reader be careful in his choice, wherein he was too careless.

In Mr. Stamford there is force and weight, and no common kind of stile; in matter none hath gone beyond him, in method, none hath overtaken him; in the or-

der of his writing he is smooth, but yet sharp, pleasant, but yet grave ; famous both for judgment in matters of his profession, and for his great skill in foreign learning. And surely his method may be a law to the writers of the law which shall succeed him.

Mr. Rastall for his long and laborious travel in collecting matters of weight and moment; which lay dispersed, and reducing them to a convenient form, hath deserved never to be forgotten. And I know not whether I may more justly commend him for his greatness of knowledge, or for the largeness of his books and labours, or for his special care of doing things exactly.

In Mr. Theloall's Digest of Writs, diligence and desire to profit is eminent. He endeavoured to be like Mr. Stamford ; but he is so far distant from the delightful progress of his style, and method, that he may seem to have lived in some other age a long time before Mr. Stamford. But as his strength was less, so his labour was equal. For in handling one title of the law, he hath dealt so painfully, that no point can

be named concerning that title, which he hath not discussed, nay to give him right, hath not fully discussed.

Mr. Lambard's pains, learning, and law, appear by his books, which are conducted by so curious a method, and beautified by such flowers of learning, that he may well be sorted amongst them to whom the law is most beholden. His style runneth like a temperate stream, his excellent knowledge and use of antiquities argueth no small reading, and a singular conceit: he hath been so universally beneficial to the whole realm, that whosoever despiseth his works, bewrayeth himself.

Mr. Crompton hath taken great pains in this study, and his books are in every man's hands, which proveth their general allowance, his cases are very profitable, and apt for the title to which they are applied, and so compendiously collected, that a man may by them in a few hours gain great knowledge.

CHAP. IV.

**CERTAIN RULES TO BE OBSERVED OF THE
STUDENT IN THE READING OF HIS BOOKS.**

NO actions have good success, which be rashly and *ex abrupto* undertaken without direction; for where advice faileth, there fortune is blind, and not in other cases, and it is far greater travel to atchieve any matter of difficulty by self-labour, than by the prescription and instruction of others: wherefore it shall not be inconvenient to propose certain rules, by which the student may hold an even course in the study of the law.

In the understanding of the law the student must not vary or depart from the proper sense and signification of the words,

unless thereby some absurdity, inconvenience, or injustice may appear ; for otherwise the property of words is strictly to be maintained, and retained. Therefore let him be diligent to search out the proper sense of words ; for as Celsus saith, *Scire leges non est verba earum tenere, sed vim & proprietatem* *. To know the law is not to know the words of the law, but the force and property of the words ; for words are as it were servants to things, because they were first invented for the plain and perfect description of things ; for though nature do make sounds, yet industry doth coin words, without which our understanding might be contemplative, but not practical ; for without them the understanding is in manner bound or maimed, because without freeness of speech and plenty of words, it cannot display itself, nor extend its force to the opening and discovery of any mean matter. And as art maketh the mind to speak, so the mind or understanding maketh art to write. Certain it is, that without

* Celsus lib. 9. digestor. Flo. Com. 28. p. Saunders.

words a man's meaning may not be certainly known : of words some be artificial, and some inartificial ; inartificial are those which the common or vulgar sort of men do use for the delivery and declaration of their intentions and meanings, serving not for the illustrating of arts and sciences, but only for mutual conference betwixt man and man. Artificial, are these which the inventors of arts have devised for, acquainting the mind with the rules and mysteries of their arts, because words fitly and accommodately used, are the very images and representations of things which do lead the understanding as it were by the hand, to the apprehension and perfect knowledge of the things themselves ; wherefore in this respect diligence must be used by the student.

2. Where the law is obscure, that sense must be taken which is least prejudicial ; for every perfect speech of man consisteth of two things ; of words, and of meaning ; and when both the words and meaning are plain and manifest, he that doubteth of any thing is rather foolish than curious ;

but when the words be directly repugnant to the meaning, the whole proposition or assertion is merely void. Obscurity in writing or speaking, is when the sense cannot be gathered ; 1. by that which of the most part of men is usually done ; 2. nor by that which was usually done by him that uttered the words ; 3. nor by the custom of the country ; 4. nor by the common use of speech ; 5. nor by the premises, nor by the sequel : and therefore if a man will hire workmen, and will covenant with them that he will give them as much as other men of the same village or parish, if some give by day 3d. some 6d. some 2d. the covenantor in this case shall give but twopence* ; because *in obscuris quod minimum est sequitur* : otherwise it had been, if it had been plainly and expressly said (as much as any other man of the said village or parish). So if a man promise upon good consideration to give to every of the canons of a cathedral church a quarter of wheat every year, and the number of the

* Guido question. 259.

canons be augmented; yet the grant is restrained to that number, which was at the time of the grant*. Yet the law doth sometime construe devises by mediocrity†; as if a man devise to one two cups for his table, without expressing the metal whereof they shall be made; they shall neither be of gold as the best metal, nor pewter as the baser metal, but of silver as a metal betwixt both; but that is, because every devise ought to be interpreted for the benefit of the devisee, and yet as near the meaning, and as far from the prejudice of the deviser as may be: therefore in devises not words but meaning is followed, and a transposing of the words may be used if the meaning require; confused things must be distinguished, generality restrained, severed things must be conjoined, implied things must be explicated. But in bargains and contracts we must not respect so much that which was meant, as that which is spoken, because bargains do properly

* Imoc. literas de rescript. 28. H. 6. 10. 29. H. 6. 6.
Temp. E. 1. Common 28. & 21. E. 3. 2. per Willy.

† Philip. Dec. Comment. ad regul. jur.

consist in *facto*, and therefore in matters of contract a man's will is rather gathered by his words, than by his meaning; for, *propositum in mente retentum nihil operatur*, and as the words do sound, so his will is to be construed; and the words of the contract be the substance of the contract.

3. When the opinions of the learned in the law are repugnant the one to the other, it is the safest and best way to follow that opinion which is most agreeable to reason; for if contrary reasons be probable, the better of them is to be chosen, and that which is more consonant to equity; and where the reason of the law doth fail, there the disposal of the law doth fail*: as of the contrary part where, the reason of the law taketh place, there the law taketh effect†. But if contrary reasons do seem to be of great force, whereof the one tendeth to a public good, the other aimeth at a private advantage, that which is for the

* Li. adiger. § quamvis de jur. patron li. 7. P. tit. 14.
c. cum cessante de appell.

† L. non possunt. & li. nam & ait Pedius dell, in p.

common good is more to be embraced, favoured, and followed; for that which is good to many must needs be good to every particular person: and these things which are generally expedient, are with good reason preferred before such things as do peculiarly profit*. But that reason which is for the profit of a private man, and doth not prejudice common right, may well be admitted. Public profit may be considered after four manners; 1. when profit doth accrue both generally and particularly as by the government of magistrates †; 2. when the profit is general, but not particular: as *locupletatio ærarii*, the enriching of the treasury in cities and towns corporate ‡; 3. when the profit is private, but yet a public good cometh of it; as the dowry of women, and the infranchising of citizens; 4. when it doth so profit particularly, as that it doth not disprofit generally; as when we say that it is not expe-

* Julian in l. ita vulnerat. § quod si quis absurde ad leg. Aquilei.

† Li. 1. §. hujus. ff. de insti. & jur.

‡ L. pen. c. de princip. li. 12.

dient, that men should mispend their goods, or throw them into the sea: that reason therefore is of more force in law, which is more generally commodious.

Aliquid ipsa utilitas justitiae prope maior et aequi.*

It is good, therefore, for the student to sift out the reason of the law, and that by very diligent and earnest search; for the reason of the law is the life and soul of the law; wherefore not without good cause is Bartolus reprov'd of the Civilians†, for that he denied reason to be of the essence of the law: and surely I think there is no law wholly without reason, I mean which was not grounded upon reason at the first making of it. Yet I will confess that the reason of many laws is so obscure, and uncertain, that it can hardly be found out, conceived, or delivered. The law is the invention of wise men, who would not make any thing public without reason, though the reason of the law may be hid

* Horati.

† Alciat. lib. 1. de verb. sign.

from him, from me, and from a number of men: neither are we to think that any law is therefore without reason, because a reason thereof cannot be rendered; for as Cicero said well, *Iniquum est quod accidit non agnoscere, si, cur id accadat, reperire nequeamus* *. It is an unjust thing not to acknowledge the thing which hath happened, because we cannot find out the reason, wherefore it happened. It is not good to affirm that the laws made by wise men do want reason; because we cannot discover the reason. But as I do not like Plato's conceit, when he forbiddeth young men not to inquire of the reason of the laws †: so to be too curious in the inquisition of it, will be rather matter of trouble than of praise to the students; therefore it is a point of humility and modesty to think those things, which by grave and sage men have been established for law, not to be without reason, though the reason thereof cannot be discerned. And that which Gentilis wittily speaketh of the civil law, may be affirmed of the common law of this

* Cicer. in ora. ad Brut.

† Plat, lib. 1. de leg.

realm, *Rationem ubique habet sed non ubique conspicuam* *. Castrensis is so peremptory for the reason of the law, that he boldly avoucheth, that he never saw any law, whereof he did not see the reason †. Theodosius did ascribe such authority to the deceased professors of the law, that he would have their answers in doubtful matters to have the force and strength of a law: And the same thing was done by Augustus, as Pomponius reporteth ‡. But yet I could wish, as Gentilis § and Alciat ¶ do require, that the authorities and cases of the learned writers of the law should rather be weighed than numbered; that is, should rather be examined how they accord with reason, than how many they be in number; but if it so fall out, that two men of great judgment do dissent, his argument is to be held for law, which reason doth inform and inforce to be agreeable to the truth: for no

* Alber. Gentilis li. 2. Epistol. c. 2.

† Castr. in eo. §. item si reip.

‡ Li. 2. de orig. jur.

§ Alberic. Gentilis li. 3. Epistol. c. 17.

¶ Alciat. lib. 4. c. 17.

man will intend the meaning of the law to be, that the opinion of any man, though singular in knowledge, should be preferred before the truth ; for both the lawyer and judge are the ministers and dispensers of justice, and of the gifts of God, and are servants to God himself ; but the servant must not do that which the master will not permit ; but neither justice nor God will do any thing against the truth : therefore, neither the lawyer nor judge ought to do any thing against the truth. If justice should judge according to opinion, and not according to verity, it should then do injury, which thing is against her nature. And though many arguments be made for the preserving and maintaining of the rigour of law, yet none of them ought so to be admitted against justice and truth, as that occasion of injury may seem thence to arise, whence right and equity should proceed * : because no reason of the law, no course of equity will tolerate, that those things which have been conveniently intro-

* *L. meminert. c. un. vi. lit. 42. coll. 9.*

duced for the profit of men, should be against their profit with a more hard and rigorous interpretation restrained. For these things which be established for a certain end, ought not to work the contrary*. But some perhaps will object, that a judge ought to determine and a lawyer ought to argue, according to the knowledge which he hath by the written law; and that is the reason and conscience of a lawyer, as he is a lawyer. But surely such arguments are not proofs, and such judgments if they be not according to the truth of the thing itself, in reason are not sound nor maintainable. For every proof should be a true assertion. and every judgment the rule of truth. And how can that seem just according to the law, which appeareth to a man's conscience to be unjust. Surely the light of the truth in an honest mind dimmeth and obscureth all cavils and quillets: and it is a frivolous dream to think, that a lawyer, hath one conscience as a lawyer, and another conscience as a Christian. For

* *L. quod favor. c. de legi.*

he hath but one soul, and knowledge of the truth, and therefore but one conscience : for *conscientia* is *cordis scientia*, and no reason will require that a lie, by any distinction, should be preferred before the truth. The principal mean to inquire after the truth of every thing, is to examine of two or more contrary reasons whether is more probable. That which is plausible to common understanding is termed probable, and when the words of a covenant or devise be clear and manifest, we follow the literal sense of them without farther investigation, because in things that be certain and apparent, there is no place for conjecture : but when the words be obscure, or when something is omitted, lest the grant, covenant, or devise do fail, we have always recourse to that which is more probable, and we imagine that more was spoken than written, and more intended, than uttered. And it is not convenient, that in the affairs of men, the interpretation which dependeth upon probable conjecture should be excluded. A thing may be probable many ways ; first, by

the common use of speech*; secondly, by comparing the consequent by the antecedent†; thirdly, by the circumstances of a man's actions‡; fourthly, by the concordance or agreement with the law, because every one is intended to conform his will according to law, unless the contrary be proved§: but it may be said, that where the words of the law do fail, the law itself doth fail. || And words were invented, that they might shew the meaning of the parties, therefore we must not regard that which is probable, but that which the words do sound. ¶ To this I answer, that there ought to be no departing from the words, and from the true property, unless there be apparent proof of another meaning: ** but where another meaning doth appear, there the tongue yieldeth to

* L. non aliter ff. de legat. 3.

† Decis. Neapol. 44. Numb. 26.

‡ Marius Salmonius ad l. omnes populi ff. de justitia. & jure.

§ Quæro. § inter locatorem ff. locat.

|| L. 4. § toties ff. de damn. infer.

¶ Li. si repetendi c. de condic. ob causam.

** L. non aliter. ff. de leg. 3.

the heart, and the words do give place to the meaning. * The words only in such case are not to be regarded, but we must consider what was meant by the person, quantity, quality, place, time, precedents, consequents, and other circumstances. † And where it is said, that if the words fail the law doth fail, it is true, unless there be some secret intent of the law to the contrary, the ground thereof is probability‡. And though a man's sense and meaning be declared by his words, § yet, because there be more things which we think, than which we speak or write, the speech of a man is not always the touchstone of the mind, but the concurrence of circumstances: and though a man's words ought to be taken most strongly against him, ¶ yet they are well to be sifted and examined, ¶ lest the

* Bal. in c. mandat de rescript.

† L. penult. ff. ad exhib. Aliciat in l. 1. ff. de verb. sign.

‡ Tiraquell in l. si unquam ad verb. lib. Num. 35. C. de revoc. donat.

§ Quintilian, li. 7. c. 7.

¶ Ad. d. l. si inguam in princi. num. 54.

¶ L. semper in stipulationibus ff. cod.

interpretation be too burdensome in some case, and so unjust against the party*. A man's speech doth consist of words and meaning, even as a man himself doth consist of body and soul, or, to make the matter more plain, the words are but the superficies, and the intent or meaning is the substance. † And the law traceth the meaning of a man by the circumstances, even as the hunter traceth the hare by the print of his feet. ‡ Yet I would not that a man's deed or act in the country should be made frustrate by some Jewish or mystical interpretation: but such an intentment must be taken, as the words being compared with circumstances will yield. For words are not by violence to be racked, but by circumstances to be ruled. And we must always so interpret, that a man's right may be upholden. But it may be further objected, that in grants and contracts, and in other private affairs, *casus*

* Locius de reg. axiom. 105.

† L. tutor petitus §. 1. ff. de exens. tut.

‡ Bartol. in l. si quis serio coll. ult. c. defur. & Cons. 275. li. 2. num. 2.

*omissus habetur pro omisso**, and the intention or meaning of a man, which is not apparent and manifest, is as a child unborn, which is of no account till he be brought to light. † For a man's speech is an external act, which is ordained for the declaration of his inward meaning, and therefore words are said to be the limits of our meaning‡. § To answer directly these words, (*casus omissus*, &c.) are to be understood only in such cases where a thing is omitted, both in respect of the not expressing of it, and in respect of the not implying it. But where the law will uphold the meaning of the party there is no need of words: and though words were invented, that they might express our thoughts, yet by them only our meaning is not signified. But there be other signs|, namely,

* L. si commodissim. ff. de liber. & posthu. l. post dotem ff. solut. matrim.

† L. Vult. c. de posth. Hæred. instit. Bald. ad l. 1. C. qui admit ad bonor post & col. 9.

‡ L. Labeo ff. de supell. legat.

§ Secyn. consi. 4. l. 4. Jason. cons. 140. li. 2.

| L. 3. ff. de test l. de minore ff. de quæst.

the circumstances before the act, in the act, and after the act. Thus it is evident, that the best and most probable reason in the conflict of opposite arguments, is to be sought for by the student, and how it may be found.

4. The best interpreter of the law is common reason and intendment. * Wherefore if any one man's opinion do differ from common reason, let the student avoid it. Neither are such things without cause to be altered, which have always heretofore received a certain interpretation. † Neither is the common law any other thing than a determinate order established and ratified by common consent. Wherefore Bodinus saith not well, who putteth this difference betwixt a law and a custom, in that a custom is accepted by the plausible agreement of the multitude, but a law springeth up in a moment ‡, and is commanded by the authority of the ruler, many times against the liking of them that

* L. si de interpret. ff. de ll. † L. minime ff. de legi.

‡ Bodin. li. 1. de repub. c. 10.

are bound by it, for common law is that which is made and approved by common allowance, and therefore it is law, because it is commonly used for law. Wherefore Athenæus* and Polybius† do upon good ground and reason reprove the laws of Plato, because no nation of Greece could be persuaded to use them: but as Plato feigned laws, so he might likewise feign men to use them: therefore Horace said rightly, *Quid leges sine moribus vanæ proficiunt*. Laws without use are vain and profit not‡. But here it is good for the student to be assured of what nature and quality the thing is which I call common reason or intendment, for what may seem to offer doubt, whether we ought to ascribe common reason and opinion to the number of authors, or to the worthiness of them, or to the persuasion of reason which doth *concludentur demonstrare* to the sense and understanding of the most part of men of indifferent capacity. I would have

* Athenæus lib. 12, c. 22. † Polybius histor. lib. 6.

‡ Horat. li. 4. carm. odc. c. 4.

common opinion taken according to this last branch.

5. The things which be odious in law must be restrained, and the things which be favourable must be enlarged. Private customs are odious in the eye of law, and whatsoever swerveth from common right: * for the common law was framed in favour of public tranquillity, and therefore the departure from it must needs be accounted odious. † The law is more prone to acquit, than to condemn: ‡ and because it is better with the restraint of an odious constitution, to absolve one that is guilty, than with the enlarging and amplifying of it to condemn one that is innocent, § therefore there is nothing that requireth more diligence and consideration, than to deal warily where there is great danger to any party, that a man may not rashly deter-

* C. cum delect de consuetud. l. cum quidam ff. de li. & posth.

† Aymo consil 170. nu. 3. Baldus in l. non possunt ff. de legib.

‡ L. Arrianus ff. de oblig. & act.

§ L. absentem ff. de poenis.

mine of a man's credit, blood, or life : since these things be of that quality, that being once lost, they can never be repaired. * But to know whether things be favourable or odious, the things are not to be considered in themselves, but the effects which proceed of them†, as dower is favoured in respect of the widowhood, and desolateness of the woman whose husband is deceased ‡.

6. It must likewise be observed, that when a thing is forbidden, all things that follow thereof are likewise forbidden : as on the contrary part when a thing is granted, all things are implicatively granted with it, whereby we may attain to the thing granted : § and if the beginning of things be forbidden, the end also is forbidden according to the rule, *Qui mediatur principium mediatur etiam finem* ||,

* Cap. ubi maj. sup. de elect. li. 6.

† Alciat. ad l. 2. in num. 44. de verb. oblig.

‡ L. 1. ff. solut. matrim.

§ L. ad rem mobil. ff. de procur. l. 2. ff. de jurisd. om. jud. Temps E. 1. Grants 41.

|| Bald. ad L. quamvis, c. de fide comm.

and things are principally forbidden for the end to which they are directed. But here a distinction is to be used, for where the consequent is of itself available, and doth not necessarily depend upon the power and virtue of the antecedent, it may be of force, though the antecedent be forbidden*, for then it is without the cause of the prohibition: but if it depend essentially upon the antecedent, it is otherwise. For the better understanding of this rule, it is good to be seen what may properly be said a principal thing, and what an accessory. This is principally which is of the greatest moment: an accessory thing is that which by consequence goeth with the principle. If the queen grant unto one *cognitionem causæ*, her highness granteth unto him the hearing of the parties, and the examination of witnesses. So the margarites or precious stones that be in gold or silver, do yield unto it, and do pass with it, because they are but the ornaments thereof, and were applied to the decking and beautify-

* Baldus ad d. l. non dubi. in 18. oppositione.

ing of it. An accessory briefly may be taken to be that which is adjoined to a thing, and is less than the thing to which it is annexed, either in substance or in value, or in respect both of substance and value.

7. The validity of an act must be especially favoured, unless there be a manifest nullity in the proceeding*; therefore whensoever the nullity of an act shall appear by the proceeding of the parties; which is said to be evident, and notorious, and excluding all cavil†, it is to be held as void, but if the nullity proposed do not so appear, but requireth a deeper search, because many times error is objected that the suit may be protracted, there consideration must be used. But in doubtful causes interpretation must be so made, that the act may rather stand than fall. But the objection of error is always to be favoured, when the error assigned doth concern the figure and solemnity of judgment‡. And therefore

* L. quoties ff. de verb. oblig.

† Bart. in l. 3. parag. condemnat. ff. de re jud.

‡ 9. E. 4. 3. gloss. in verb. defensiones inde sæpe de verb. figur.

he that will dispute of the validity of an award or judgment, ought to be wary and careful, that he put the ax to the root, and that he first examine the jurisdiction and power of the judge, because that being the basis and foundation of the judgment, if that fall, the rest cannot stand. It is therefore to be considered whether he were a competent judge by reason of the cause, of the parties, of the time, and the place. For by reason of the suit or cause, a judge may be incompetent, as if the cause belong to a mere jurisdiction, and the judge be only a magistrate in a certain corporation: or if the cause be civil, and the judge who taketh cognizance of it be judge of gaol delivery, or if the judge be secular, and the cause ecclesiastical, or if the judge have some other limited jurisdiction, and he taketh cognizance of a cause not comprehended within the lists and bounds of his commission, he may be incompetent also by reason of the place, as if he judge of causes without his territory, or circuit, or else within his territory, but yet in a place exempted, he may be incom-

petent by reason of the time, as if he did judge before he had his commission, or after his commission expired, or if his jurisdiction were suspended, as at festival times, which we call *dies non juridicos*, or at such a time, when a greater judge was present; or if the judge were called to a higher place, or if he were forbidden to exercise his power. And also the person and quality of the party is to be considered, because some by reason of a legal impediment are incapable of the advantage of law, as these that are outlawed, excommunicated, and out of the queen's protection. And there can be no fast root or sure ground of their proceedings, for such are to be denied audience, because their offence and default ought not to find patronage. Likewise there may be a default in the party making an attorney, as if he could not make an attorney in that cause, or else by reason of the attorney himself, as if he be incapable of such an office as being not lawfully authorised. But if a jurisdiction be given and granted to one, it is

to be intended to be given him *accumulative, et non privative*, rather to enlarge, than to diminish his power. And though a judge of the gaol delivery being appointed and ordained by commission to the hearing of causes criminal, may not principally inquire of causes civil and pecuniary, because it is a jurisdiction limited, yet incidently and as it were by the way, for the better examining of capital crimes, he may take notice of such things. But if the process and judgment be framed against one, who is not only not subject to his jurisdiction, but is also free from the jurisdiction of every man living, as if the party be dead, concerning whom, no act can be conceived or upheld, the judgment is void.

Thus have I shewed to the student in so general manner as the order of this treatise doth require, and likewise so particularly, as to his understanding may be plain and manifest, what course he ought to take in examining the cases, reasons, opinions, arguments, proceedings, and judgments,

whereof he shall find great store and abundance in his books. Now I will by favour descend to describe and delineate unto him briefly (for it is a matter which may be handled plainly and in a few words) what course he ought to observe in the exercise of his study.

CHAP. V.

**OF THE EXERCISE AND CONFERENCE WHICH
THE STUDENT OF THE LAW OUGHT TO
USE.**

EVERY art and knowledge produceth effects, and like a good weapon is unsheathed and used in time convenient, otherwise it would be quickly overcast and eaten with rust. But there is nothing that with so much brightness and glory illustrateth our knowledge, as the orderly and judicial applying and accommodating of that which we have read. For as a man knoweth by his books, so he is known by his practice, and by that which he is able to perform in the faculty which he professeth, and he which knoweth to him-

self is not known of other men. Wherefore I suppose it a thing of exceeding moment for the student, to demean himself well in his conference and exercise, lest the multitude of hours which he hath spent, do slip from him without use, as the sand falleth out of the hour-glass, when no man seeth or mindeth it.

1. The student of the law ought to have great regard of his speech, and that he deliver his opinion or argument in convenient and orderly sort, not after a rude, confused, and impolite manner, and he who is not only wise but eloquent, is without comparison the best in all professions which consist in practice and in the form of speech. Therefore parents and tutors in the university should have principal regard that he who is to address himself to the study of the law, may be fit with a plausible grace to discourse and dispute, and even in the prime of our years this care must be had. For by nature we hold that fast which in our tender years we conceive, and the worse sort of things do stedfastly abide in us, the better is soon

turned to worse, but in this matter it is good to follow the precepts of such as he neither too curious nor too ignorant: for there is nothing more like a may-game than these vain-glorious persons, who have decked themselves with a false persuasion of knowledge. To the student of the law I do therefore think this course necessary, because he must live in great celebrity in the assembly of the people, and in the midst of the common-weal. Let him therefore inure himself, from his youth, to frequent assemblies: let him not be afraid of men, nor appalled or timorous through a shadowed kind of life, lest when he should make use of his study, his eyes dazzle at mid-day, and all things be new unto him, who seeketh that in himself, which is to be done and performed in a multitude: yet I would not have him too curious and dainty in his speech, for we must use words as we use coin, those which be common and current. And it is a great error for a man to estrange himself from the common use of speech, and exceeding preciseness in words, and style, doth quench the heat

of our invention, and bridled the course of our wits. Yet it is commendable to have in our discourses both good words, and good matter. For Cicero did not fight with armour of proof only, but with bright shining harness, when he did not only gain the admiration of the Romans, but their acclamation also and applause. But let good words contain in them good matter, that the argument or discourse may not shine as it were by oil and ointment, but by blood and complexion. It is a fever-like pain to endure a man's speech, loaded with superfluous words; in all things *decorum* must be observed, lest that which we say do turn to laughter, or loathing, and purchase the name of folly, a mean must be kept, lest our speech be dry and faint, or else too copious, and full of circumstances: yet it is better for the invention to be abundant and copious, than to be lean and poor. Words if they be not vested with the substance of things, are of no force: rhetoric which is the artificer of persuasion, if it be severed from circumstances, and range without learning by a facile kind of sway,

it is called *Atechina*. If it be applied to the destruction of good men, it is termed *Cacotechina*, but if it be bestowed in vain and superfluous matters, it may be termed *Mataotechina*, a frivolous labour, and a trifling art. There is nothing which more beautifieth a man's speech, than an apt division or partition of the things which be handled, which doth ease the mind of the hearer, prepareth the mind of the understander, and refresheth the memory, and (as Justinian sayeth) the obscurity which doth rise of a confused text, is by separation and division dispersed and removed*. And as the division of fields doth make the tillage more plentiful and sightly, so doth partition in the handling of causes adorn and garnish them. These things may be aptly divided which have a separate reason, and are sorted to divers ends.

2. Students shall not do amiss, if at certain times they meet amongst themselves, and do propose such things as they

* Justin. in §. alio. insti. quid. modis res. infirm. & in §. sed ne in primis de leg.

have read or heard by that mean to be assured of the opinion of others in such matters. By this course it may be brought to pass, that every one may both better understand, and more firmly retain in memory the things which he hath read or heard, and these things which be to good purpose uttered of others, he may enjoy as his own. For private conference there is no time amiss. Adrianus the Emperor (as Dio reporteth) did handle and discuss points of law at dinner-time. M. Cato even in the court whilst the senate was assembling, did busy himself in reading: and surely, he that hath a mind to learn, may learn at every place, and at every time.

3. Gentlemen students of the law ought by domestical moots to exercise and conform themselves to greater and weightier attempts, for it is a point of warlike policy, as appeareth by Vegetius to train young soldiers by slight and small skirmishes for more valorous and haughty proceedings*,

* Veget. lib. 1. de re militari.

for such a shadowed kind of contention doth open the way, and give courage unto them to argue matters in public place and courts of record, and it will not be amiss sometimes to reason together, before men of more reading and greater judgment, which may friendly admonish them, and if they err reduce them into the right way. It is good to bring such matters into question as be disputable, and may deserve argument, for it were a vain thing to make a doubt of that which is plain and manifest; as whether a rent or annuity ought to be paid to a dead man, or whether a man may commit an offence against the law without punishment and such like; wherein if a man should ask any man's opinion, he might perhaps receive such answer as Labio did of Jubentius Celsus: *Aut non intelligo quid sit de quo me consulis, aut valde stulta est consultatio tua**. It is evident that one law may, with good probability, bear several interpretations, but that sense is most to be embraced which

* L. Domitius Labio de testa.

doth take away the occasion of doubting; the way to remove doubt, is to examine well the reasons of the contrary part, wherefore Baldus saith well.

*Ferro aperire viam qui per contraria transit *.*

And to lose doubts is to find out the truth as Aristotle saith †, but often conference and private debating of points of law, is the fountain and original of exceeding profit, for by it the wit, the memory, and the tongue are greatly furthered and helped, and a man is made more ready and bold for public matters, and the truth, which is the mark of our study, doth more easily appear. Wherefore it is not unfitly said of Marcellus, the lawyer, that every art by continual exercise doth receive increase ‡. The wit if it be somewhat dull is by conference more sharpened, if it be ripe and ready it is a great deal more furthered, and to the memory nothing can be

* In. l. precib. c. de impub. † Arist. Metaphys. 3.

‡ In l. legatis §. ornatri de leg. 3.

more profitable, which of itself is so brittle and tender, that unless it be renewed with continual exercise, it will easily perish. And in vain shall a man pass away the night without sleep, or the day without recreation, in vain shall he run over the volumes of the law, in vain shall he inquire after the opinions of the learned, unless his memory do represent and readily offer unto him, these things being with great labour followed and achieved, when time and occasion shall require, I need not show how much it doth benefit and polish the tongue: for conference is the proper exercise of the tongue. I said that boldness is procured by the frequent meeting and communication of students, and I will avow that which I have averred, for as by degrees a man doth converse and talk with his companions, and such as be better than himself, so by degrees he groweth bolder, which may be gathered by that fable of Æsop: The fox did by chance meet the lion, whom he never saw before, and was so affrighted that his

senses were almost lost, when he saw him the second time, he feared likewise, but nothing so much as before, but when he saw him the third time, he was so little afraid, that he went unto him and talked with him. I said further, that it was the highway to discern the truth of every thing, and therefore Archadius sayeth of Herennius Modestinus, that by much disputation he attained to excellent judgment *, wherefore let the student often resort unto his fellow students, and amongst them let him be well advised of his choice.

4. After private and home exercise, public exercise must ensue, which must not be rashly done, but there must be both maturity of years and advice, lest the unripe brain do make the forehead to blush, and instead of praise we reap contempt. Surely it is the beginning and foundation of impudency, for a man to prevent his ability with audacity, yet as I would not have too young a student to enter into this field, so I see no reason that the time should

* In l. muner. §. mista. de muneri. & honori.

be too long protracted, and as it were deferred until middle age, for by that means, fear will greatly increase upon us; and that which we aim at will daily seem more difficult. Therefore it is good that the fruit of our study should be somewhat green, whilst pardon, hope, and favour may be remedy for us, whilst our years may supply the defect of years, and our latter pains may amend our former faults. Cicero, being but twenty-six years old, did, with the great applause of his auditory, handle the cause of Sex. Roscius, and if any thing were wanting to his time, that, as himself confesseth, the years succeeding did bring. He that will argue well must be free from anger, for no affection of the mind is a greater enemy to reason, it leadeth a man out of the way and maketh him, many times, both to give and suffer indecent speeches. Moderation is far more convenient, yea, and sometimes patience. It is good even in the heat of disputation to yield unto the truth, for obstinately to maintain an error, is another error, and where a man must needs be overcome, it is

best for him to yield, but importunate garrulity, is to the adversary troublesome, to the judge loathsome, to thyself shameful.

5. It will be very expedient for the students of the law to endeavour amongst themselves, if any law seem to be repugnant and contradictory to another, to reconcile them and bring them to agreement, and herein let them appeal to the opinion of men more grounded in the law. In the books very often the principal sense of law doth differ from the literal sense. This was a law amongst the Romans, *Peregrinus si murum ascendat capite puniatur*. Now the case was thus, certain enemies did scale the wall, and a stranger did ascend to beat them back. This matter is informed against him, there can be nothing more probably urged against the literal sense of the law, than the matter proposed in question, for might not a stranger climb up the wall to save the city? Likewise the case was, 3 of Queen Mary *, that a

* 3 Mary, 128 Dy.

maid servant did conspire with a bad fellow to rob her mistress, and in the night she opened the door and brought the fellow to the bed of her mistress, who did kill the mistress, the maid holding the candle, but saying nothing, the question was, whether she was a principal, and whether she was a traitress: by the letter * of the law she should seem to be a principal, because she was present at the act, and did concur with the murderer from the beginning to the end, but by the intent of law †, she should appear to be but accessory, because the opening of the door, and the holding of the candle was not parcel of the consummation of the act, and so was the law taken 3 of Queen Eliz. ‡. An adulterer did counsel the woman to murder the child when it should be born, the child was born and murdered by the midwife in

* Pl. Com. 100. 4. H. 7. 18. 13. H. 7. 10. 3. E. 3. Coron 309. Stamf. f. 40. 2. E. 3. Indictment 22. E. 3. Coron 314. & 350.

† 2. E. 2. Coron 395. Stamf. f. 40. 27. Ass. pl. 4. 22. Ass. pl. 43.

‡ 3. Eliz. 186. Dyer.

the presence of the mother, and by her commandment. The mother and the midwife be principal, and the adulterer but accessory, because his counsel was before the birth, and he was not co-operant in the act, but because the force of his persuasion and counsel did continue until the murder, it being not countermanded by him, therefore he was held and adjudged an accessory; but whether in the same case, if the woman be admitted to be accessory, whether she should be a traitress or no, because the principal is no traitor, is a question which may well bear argument on the one side upon the letter of the law, and on the other side upon the meaning of the law; but of this matter I have given the student a sufficient taste, and my meaning was in this treatise rather to draw the lineaments of things, than to discuss them to the full. These may serve to prepare the mind of the student to handle such things as may seem to be contradictory in the body of the law.

6. That the student may with more ease

compass and accomplish the things precedent, it is good for him to have great care of preserving and continuing his memory, and therefore it is a profitable course under titles to digest the cases of the law, into which they may transfer such things as they have either heard or read ; neither is it safe to trust to other mens' abridgments, which are little available to such as have read a little, but that which we by our own sweat and labour do gain, we do firmly retain, and in it we do principally delight, and I am persuaded there hath never been any learned in the law, and judicial, who hath not made a collection of his own, though he hath not neglected the abridgments of others. The memory is specially to be helped and increased of the student, for though it be the gift of nature, yet by industry it becometh more excellent. For the integrity of the memory it is good to have sound health and convenient digestion of the meats, and a mind free from all other thoughts ; it helpeth it much to make good divisions,

for he that divideth things aright, can never err in the order of things. There is nothing surely which doth either more grow by diligence or by negligence more decay than memory: it is not good trusting to a sudden memory, but a night's rest will add great strength unto it. Of what force memory is by nature and labour Themistocles may witness, who in one year's space did speak the Persian language very perfectly, and Mithridates who did well understand the two and twenty languages of the nations whom he did govern. M. Crassus whilst he was President of Asia attained to the five differences of the Greek tongue. Cyrus did remember the names of all his soldiers who were in his camp. And if memory be necessary for any science, surely to the profession of the law, it is of weighty importance, which because it doth pursue *accidentia*, and *infinita*, requireth no help of nature so much as memory, for the understanding conveyeth the cases to the treasury, out of which it draweth them as

often as use and opportunity doth demand. But if the understanding be good, and the memory nought, a man shall be a lawyer to-day and none to-morrow. Wherefore in this part the student must excel, and that he may excel, he must labour, and that he may labour, he must have health, which I wish unto him.

CHAP. VI.

THAT THE UNDERSTANDING OF THE STUDENT OUGHT TO BE PROPORTIONABLE TO THE INTENDMENT OF THE LAW.

THE law considereth things according to public respect, that is, as much as concerneth the common-weal, not according to their contingency in *facto*, which is every man's object, and familiar to common sense, and therefore needeth not any artificial handling; and the student's understanding must be so sequestered and refined from vulgar opinion, being the mother of error, and measuring things only by the skin and colour, that he must comprehend and conclude many things, which are very remote from the reach of the

senses, and from ordinary apprehension ; in which contemplation the common law of this realm of England, above all others, doth shew wonderful sharpness, and a most exquisite conceit, subtilizing things whereof common sense hath but a confused knowledge, being guided by the principal reason and inseparable truth of every thing, which the understanding straineth out of the secret and hidden causes of things ; for as in herbs, if we touch them outwardly, we do not find nor feel any moisture in them, but rather take them to be dry, until by pressing or distilling of them, we wring out a juice proper to their nature. So the law doth conceive and conclude many things of ordinary contingents, which common sense cannot perceive, but rather imagineth them to be clean contrary to the truth, whereas they may, to a good understanding, easily appear to be true by the certainty and necessary co-ordination of their causes and reasons, that this may be made evident I mean to annex some particulars for the explaining thereof.

1. It is clear by law, that a term and a freehold of the self same thing may be both in one man at one time, yet if this be delivered to a superficial understanding, it will seem a paradox. Tenant for term of years maketh his executors and dieth, the executors purchaseth the reversion, in this case both the term and fee-simple are in the executor to several purposes: for the term shall be assets to the use of the testator, and the fee-simple free inheritance for the use of the executor and his heirs *. And if a man be seised of land of an estate for life, the remainder to his executors for years, he may devise this term or assign it †. And if lessee for years grant his term to the wife of him in the reversion, and to a stranger, the inheritance of the husband cannot extinguish the moiety of the term; because he hath the inheritance in his own right, and the term in right of his wife ‡. A man seised of land in right of his wife is attainted of felony, and the

* 43 E. 3. 27. & Br. cases.

† 16 E. 2. per Herle, Covenants 25.

‡ 14. Ed. 416. Com. Bracebridge's case.

king seiseth the land *pro vita viri*, the king hath but a chattle, and the wife the freehold: for if a stranger enter, and the husband die, the wife shall have an assise*.

2. Likewise it will seem strange, though in law and reason it be true, that a man should be remitted to his land to some intent, and yet not to another. As if a recovery be had upon a false title against tenant in tail, the tenant in tail dieth, the issue entereth, he is in of his first right against all but only the recoveror. † So if tenant in tail discontinue, and his son and heir apparent disseiseth the discontinuee to the use of the father; the tenant in tail dieth, the son, by M. Choke's opinion, is in his remitter against all, but only the discontinuee; ‡ the issue in tail which hath good cause of a *formedon* in the descender, is of covin that *A.* should disseise the discontinuee against whom he recovereth; he shall not be remitted in respect of him, but

* 4. E. 3. 47.

† 12. E. 4. 21. per Choke.

‡ 12. E. 4. 21. per Choke, & vide 7 R. 2. tit. Entre in le Per, in le collect. de Bellew.

shall be accounted a disseisor ; * but against all others it seemeth that he is remitted. Tenant in tail maketh a feoffment to the use of his wife, and his son being heir apparent to the in tail dieth, the issue is remitted against all persons but only the woman †.

A title may be executed to some intent, and yet not executed to another : and, therefore, if there be tenant for term of life, the remainder in fee to a stranger, against whom a recovery is had *pro loco & tempore* in a *warrantia chartæ*, brought by a stranger of other land, he in the remainder dieth, the recoverer is impleaded and vouceth the heir of him in the remainder, and recovereth ; tenant for life dieth, execution shall be sued against the heir of the land whereof his ancestor had a remainder, because there was a remainder executed in the father to this intent at the time of the *warrantia chartæ* brought : ‡ but to all other intents it was executory,

* 13. H. 8. 5. 15. E. 4. 4. † 4. E. 6. 68. Dyer.

‡ 15. E. 4. 13. per Littleton

for it was not executed that the wife might be endowed, nor for him in the remainder to bring a writ of right, * but the remainder in such cases is to some intents executed; for if he in the remainder had aliened his remainder in *mortmain*, the lord might have entered, † and upon such a remainder the lord may have a *Cessavit*, ‡ but the heir shall not have an assize of Mortdancer §.

4. A thing may be extinct or in suspense in one respect, and *in Esse* in another respect: the father being tenant in tail alieneth the land with warrantry, and hath a rent charge in fee, issuing out of the land of his son and heir apparent, which rent descendeth to the son; this rent is a good asset for the value in respect of the discontinuee, and yet it is extinct in respect of the issue. || A man seised of a rent service is bound in statute staple, and

* 40. E. 3. 43.

† 15. E. 4. 13.

‡ 27. E. 3. 87.

§ 39. E. 3. 3. Mortdancer 50. F.N.B. 196. k.

|| 31. E. 3. Garranty 39.

after purchaseth the land, out of which the rent is issuing, after execution, the rent is extinct, as to the conusor, but *in Esse* as to the conusee; * a corody is granted to J. S. for life, who granteth it back to the granter for term of years rendering rent, the corody is *in Esse* as to the payment of the rent, but in suspense as to the taking of the corody. † And it was lately ruled in one *Caire's* case, in the Court of Wards, that if a man held land of the queen by a certain rent, and the queen granteth the rent to a stranger, who granteth it to the tenant, the rent is extinct as to the payment, but *in Esse* as to the tenure. The king seised of a forest, granted the office of the forester to one rendering rent, and he granteth the forest to another, the forester forfeiteth his office, yet the grantor shall have the rent ‡; so that it must needs be that the office to the intendment of law is to that intent *in Esse*. And if a man grant to another a

* 4. Eliz. 205. Dyer. † 20. E. 4. 12. 22. E. 4. 17, 18.

‡ 26. Ass. p. 60.

rent out of his land in fee, upon condition that if the grantee or any of his heirs die, their heir being within age, the rent shall cease during the minority; if the grantee die, his heir within age, his wife shall have dower, but *cessabit executio* during the nonage: * but in this case it seemeth that if the heir die during his nonage, the wife of the heir shall not have dower of the rent; because it was never leviable by the son, as it was by the father. A man seised of two acres of land hath issue two daughters and dieth, now the rent is in suspense, as to one moiety, and *in Esse* as to another moiety †.

5. The intendment of the law is as strong in a matter of law as the truth itself in a matter *in facto*: and, therefore, if *A.* be disseised, and his brother maketh a release with warrantry to the disseisee, and afterwards entereth into religion, this warrantry shall be a bar to *A.* although that he be living ‡: for *A.* may have his land

* 10. H. 7. 13. per Keble.

† 9. E. 3. Charge 4. 9. Ass. p. 22.

‡ 34. E. 3. Garranty 72.

by descent, and therefore it seemeth to be reason, that the warranty should descend upon him as his heir. Note here of what validity the intendment of law is touching a civil death. The Warden of the Fleet, who hath the office in fee, dieth seised, and the office descendeth to his son and heir, being then in prison, the law doth presently discharge him of imprisonment, because he is to be at large the better to look to others, that be in prison. * A man maketh a lease to one for term of life, rendering the first seven years a rose, and if he will hold the land any longer than seven years, that then he shall pay four marks yearly: livery is made, the lessee surrendereth at the end of the first seven years, his estate was adjudged to be but a term *ab initio*, and no freehold, and the writ of covenant brought against him for not repaying was *qui tenuit ad terminum annorum*. † If a man make a lease of land excepting the trees which grow upon the

* Flo. Com. Plats c. 87.

† 50. E. 3. 2. vid. Moore 17. & id. 330.

land, the trees are severed in law; for he hath no reversion of them, and if he sell them, and after the sale make a feoffment, the feoffee shall not have them, because they were severed by the vendition or sale of them *, for by the exception they were severed from the term, but not from the inheritance, but by the vendition they were severed from the inheritance. If the bailiff of the land do demand a rent-service, and the tenant denieth it, and the bailiff sayeth that he will distrain for it, and the tenant sayeth that he shall not distrain, wherefore the bailiff dare not proceed further to take a distress, for doubt of death this is a disseisin of the rent in the eye of the law. † And if a rent service be warranted to one, and the land doth escheat, the law, as M. Finchden thinketh, transfereth the warranty to the land ‡.

6. One thing in the understanding of law may be of several natures in several

* 20. H. 6. 22.

† 49. E. 3. 14. Assise 66.

‡ 45. E. 3. Voucher 72. per Finchden.

respects, and so one writ may be two several writs to two several intents. In an action of debt the declaration was of 10*l.* upon a sale, and 5*l.* which he had delivered to the defendant to re-deliver, and it was held good, because the action was in the *debet* and *detinet*, and the warrant of attorney and the esoin in this case shall be *in placito debiti*. * *Quere*, If a man lease land to one for term of years rendering rent, and the lessor granteth his rent to a stranger, and the lessee surrendereth, this doth not extinguish the rent, for now it is a rent seck which doth not depend upon the reversion; † and so one man to the understanding of the law may have several capacities or respects: for if a man disseise a feme sole, being an inheritrix of certain land, and after he taketh her to wife, and they have issue, and the husband is disseised, and the disseisor levieth a fine with proclamations, the husband dieth four years after the proclamations, and before the fifth year be passed, the issue be-

* 32. E. 3. Bre. 288.

† 20. E. 4. 12.

ing of full age, and after the wife dieth, and the fifth year passeth, now the issue is bound as heir to his father, yet he may have other five years, as heir to his mother, to be accounted from the death of his father. * So if *J. S.* be tenant of land, for term of another man's life, the remainder to another for life, the remainder to the said *J. S.* for term of his life, or in fee; and he is disseised, and the disseisor levieth a fine with proclamations, and the five years incur, now is *J. S.* bound for the present estate; but if he in the mesne remainder for life die, he shall have other five years for the other estate. † So if a man have an estate in land for the life of *A.* the reversion to himself for the life of *B.* the remainder to himself for the life of *C.* and is disseised, and the disseisor levieth a fine with proclamations, he shall have five years severally after every several estate determined. ‡ *J. S.* giveth land to *A.* his daughter in tail, and hath issue *B.*

* Plow. Com. Stowels c. 367.

† Ibid.

‡ Plow. Com. 368. Stow. case.

another daughter, and dieth. *A.* dieth having issue *C.* a *precipe* is brought against *C.* who voucheth to warranty herself and *B.* as heirs to the donor of the reversion to have the warranty paramount, in this case is *C.* both the voucher and the vouchee.

* A term is devised to one who is made executor, he entereth, this is an administration to an execution of the term unto him, and he is both devisee and executor.

† *A.* covenanteth by indenture with *B.* that the son of *A.* shall marry the daughter of *B.* and that therefore *B.* shall give unto *A.* an 100*l.* and if the marriage did not take effect before such a day, that then *A.* and his heirs should stand seised to the use of *B.* and his heirs until the hundred pounds be paid by *A.* his heirs or executors: *B.* dieth, and after the marriage taketh not effect, the use and possession of the land vesteth in the heir of *B.* but *quere*, saith Brooke, whether he shall be in ward or no, for he is an heir and yet he is a pur-

* 2. H. 6. 16.

† 20. Eli. Com. Welden's case.

chaser. * If *J. S.* be Dean of *P. I.* may give him land to him and his successors, and to him and to his heirs, there he taketh both as dean and as a private man, and is tenant in common with himself: so if a rent charge be granted in such manner, he shall join with himself in an avowry. † Likewise the law may deny one a benefit as he is *J. S.* and yet allow it unto him as he is executor to *J. N.* and therefore if an executor be outlawed, or excommunicated, which be disabilities in law; yet as an executor he may maintain an action, because he sueth and is to recover to the use of another person ‡. And so an executor may have an action of trespass in his own name, without naming his companion in the executorship, if goods be taken out of his possession §. For he is possessed of them as a private man, but he is possessed of them to the use of another as executor.

* 3. Mar. Br. Feoff. al uses 59. & vide 3. Mar. 123. Dy. Wils. case & 13. E. Br. Exting. 45.

† 24. H. 8. 30. per Pollard.

‡ 14. H. 6. 14. 21. H. 6. 2.

§ 42. E. 3. Executors 67.

* And he need not, in the case aforesaid, name himself executor †. For if he do, it may tend to the abatement of the writ according to M. Keble's opinion ‡, who saith that the possession of one of the executors (his meaning is as he is executor) is the possession of both, and herewith agreeth the opinion of Newton, but by their favours though the property of the executors in the goods of the testator be one and the same, yet the possession may be several, for he that hath the custody of goods may only be said to be in real and actual possession of the same, which kind of possession is only here meant, for which cause a writ of *Detinue* that concerneth the possession of goods, shall be brought only against that executor who is possessed of the goods.

7. § The law may work several things in one instant, as if a disseisor make a lease for years, and after he and the disseisee

* 11. H. 6. 35.

† 12. R. 2. Executors 75.

‡ 16. H. 7. 4. per Keble. 19. H. 6. 65. per Newton.

§ 21. H. 6. 1. 39. E. 3. 5. 9. H. 5. 14. 11. H. 4. 46.

release, by one deed to the tenant for years, the law adjudgeth the release of the disseisor first to take effect, and after the release of the disseisee, for there is no privity nor estate in the lessee, upon which the release of the disseisee may inure, if the law do not make such construction *. If the tenant for thirty years make a lease for ten years, and they both surrender to him in the reversion, the surrender is good for both estates, and yet the lessee for ten years could not surrender by himself for default of privity, but when the other joineth with him his surrender shall be taken to go before and the other to follow it. † Likewise if the tenant for term of life surrender to the grantee of the reversion, this is both an attournment and also a surrender. ‡ So if a man have land by descent, by the mother's side, and leaseth it for years, the lessee covenanteth and granteth to pay yearly to the lessor and his

* 21. El. Com. 539. Para. cas.

† 14. H. 7. 1. & 4.

‡ 19. Eliz. 258. Dyer.

heirs 20s. the lessor dieth, the law in a moment will convey the reversion to the heir of the part of the mother, and the 20s. to the heir of the father's side, because it is a sum in gross *.

8. By intendment and admittance of law a thing suspended may be revived, for if the donor disseise the donee in tail, and after maketh a feoffment, and the tenant in tail re-entereth, now the feoffee shall have the reversion. † So if the heir in tail entereth upon the discontinuee, and maketh a feoffment upon condition, and for the condition broken re-entereth, and after a recovery is had by the discontinuee, the issue in tail is now restored to his first action, and the entail is revived, for by the breach of the condition the feoffment is disannulled. ‡ Tenant for life, the remainder in tail, the remainder in fee to the heirs of the tenant for term of life, granteth a rent charge in fee, this shall charge the

* Plow. Com. 132. Brow. case.

† 9. H. 7. 25. per Fineux.

‡ 23. H. 8. Br. Restore al primer acc. 5.

land during his life, but it shall be suspended during the in tail, and after the in tail determined it shall be revived, and shall charge the heir of the tenant for life*.

9. The law altereth the nature or substance of a thing by matter, *ex post facto*. A man seised of land, in right of his wife, entereth into religion, the wife alieneth, the husband is deraigned, the husband may re-enter into the land. † So if a man be indebted to a villain, who recovereth in an action of debt, and after the debtor purchaseth the manor to which the villain is regardant, and afterwards alieneth it, the villain may now have execution. ‡ If a man make a lease for term of another man's life rendering rent, and the arrearages incur, the lessor shall not have an action of debt, because he hath a frank-tenement in the rent, but if *cestui qui vie* die, now is the freehold, as to the rent, converted into a chattel, and now he shall have

* 5. E. 4. 2. † 33. E. 3. Entr. congeable 52.

‡ 12. H. 4. Execu. 28.

an action of debt. * Likewise a divorce altereth the estate of frank-marriage into a bare freehold. † If a man add a condition to a single obligation after the delivery, this maketh the obligation void, for now it is not his deed, and the same law is of the raising or interlining of a condition after the delivery of the obligation. ‡ If land be given to one in tail, and the donee giveth the land to the donor, and to a stranger for term of their lives, this is a discontinuance conditional, namely, if the stranger survive. § If the sheriff attach one by force of a *capias*, that is justifiable; but if he return a *non est inventus* upon the writ, he is a trespasser *ab initio*. . || If I disseise *J. S.* and levy a fine to *J. N.* and after *J. S.* entereth upon *J. N.* and enfeoffeth me, and *J. N.* entereth upon me, and I bring my assise, and *J. N.* pleadeth the fine in bar, I may avoid the fine by

* 39. H. 6. 26. per Paston.

† 7. H. 4. 16.

‡ 36. H. 6. 5. per Ash. Just.

§ 28. H. 8. 7. Dy. per Fitzh.

|| 3. H. 7. 11.

shewing the matter aforesaid. * If a fine be levied of land in ancient demesne, and the lord disammulleth the fine levied at the common law, he hath restored the right to him that levied the fine. † If he which abateth after the death of the tenant in fee-simple make a feoffment, upon condition to be performed within nine years ensuing, and after the feoffee levieth a fine with proclamations, and the five years incur, the condition is broken, and the abator re-entereth; now the heir of him that died seised may have an assize of Mortdancestor against the abator, whereas before he was bound by the fine. ‡ Tenant in tail maketh a feoffment and taketh back an estate in fee, and bindeth himself in statute merchant, and then maketh a feoffment upon condition, and after the recognizance is put in execution, and the tenant in tail dieth, and the heir in tail being within age entereth for the condition broken, he is remitted, and the recognizance avoided,

* 25. E. 4. 5. per. Litt. † 16. E. 2. cont. claim, 10.

‡ Plow. Com. 358. Stow. case.

but otherwise it had been if he had been of full age; for then he coming in under the estoppel should not have avoided the estoppel, nor by consequence the recognizance. * If my very tenant be seised of a manor held of the king in capite, and of another manor held of me by knight's service, and he is disseised of the manor held of the king, and afterward dieth seised of the manor held of me, whereupon I seize the body of the heir, and after the heir within age recovereth the manor held of the king, now the king may have my land also in ward, because the heir shall now be adjudged to be in my descent, and the king shall have the wardship of the body. † If my horse strike one, and after I sell the horse, and afterwards the party that was struck dieth of the stroke, now shall the horse be forfeited as a *deadland*. ‡ If a villain inflict upon himself a mortal wound, and the lord seiseth his goods, and then the villain dieth, now shall the queen

* 8. H. 7. 7.

† 15. E. 4. 14. per Littleton, Skreene's Case.

‡ Com. 290. per Cat. Dame Hale's Case.

have his goods because he is *felo de se*.

* A man administereth of his own wrong, and after taketh letters of administration of the ordinary, this shall relate to the death of the intestate. † The heir chargeth land which is after recovered in a writ of dower, the woman shall hold it discharged. ‡ Thus it is evident that the understanding of the law worketh especially upon relations on the first causes of things, reducing through many straits of colourable pretences and objections, the right of a thing to him to whom it appertaineth, according to the quality and exigency of the said right and title, so that the understanding of the student when it entereth into the survey of these intricate and hidden points, must be of this ability to compound things, and to resolve them by imagination, to build and destroy, and to turn sail by circumstances and occurrences; for there is no case which accidents may not alter, but that one thing

* Com. 290. per Cat. Dame Hale's Case.

† 9. E. 4. 35.

‡ 10. H. 7. Charge 3.

may countervail another, or that a defect may be supplied by enforcement of reason, or that a wrong may be purged and transformed into right, and black as it were changed into white, contrary to nature is the work of intelligence reflecting upon itself, some perhaps carry such spiced and scrupulous consciences, that they cannot abide any fiction or representation of a thing that is not *in fact*, but surely the supposal admittance and intendment of the law is necessary, without which neither the science of the law, nor any other which consist in contemplation and abstraction of the essences of things from the confusion and mixture of circumstances can be of any worth or force. And though I must confess that every thing which is imagined to be done, and is not actually done, is a phantasy, or an untruth, yet this must be granted, that, that which is not really done, and yet for avoiding inconvenience must be supposed to be done *in fact*, is not a fault, though it be false. Many things of this kind and quality have I before immediately proposed, which will

be void of all effect, if you take imagination from the law; let it therefore be considered what this imagination is whereof we speak, that by the description thereof it may be better known. It may thus appear unto us, *fictio* a supposal, or admittance of a thing to be, is *legis adversus veritatem in re possibili ex justa causa dispositio*, the disposing of the law against a matter of truth in a thing that is possible, grounded upon just cause: and there is great difference betwixt imagination and presumption, because *fictio juris* the imagination of law *tantum operatur quantum veritas ipsa*, in the conclusions and decisions of law, and the law maketh sometime *ens ex non ente* in intelligence, though not in existence: but *præsumptio stat in dubio* it is doubted of and yet it is accounted *veritatis comes*, the companion of truth, *quatinus in contrarium nulla est probatio*. And the use of supposal or fiction in the law is only to supply that *quod desideratur in facto*, which is wanting in fact, *ut ex ipsa producantur veri juris effectus*,

that true effects and conclusions of law may proceed from it. The logicians say, that the universals are not *in rerum natura*, for if they were, they should be *monstra*; for an universal man, or an universal tree, comprehending in it all trees, is rather by understanding to be comprehended than by sense to be compassed; yet I would not have any imagination to be used, but where equity and the orderly coherence of things doth require it.

CHAP. VII.

THAT THE STUDENT OUGHT WELL TO CONCEIVE THE REASON AND JUSTICE OF THE LAW IN DISTINGUISHING AND ESTABLISHING THE PROPERTY AND COMMUNITY OF THINGS.

THE end and effect of the law is to settle the property and right of things in them to whom they belong : And to judge those things common which continuance of time and the intercourse of parties hath distributed and warranted to many, for if all things should be common, there should be nothing in order, and if nothing should be common, men would hardly be kept in duty, for then should friendship, society, and conversation, the comforts of mankind,

fail, which would turn the whole common-weal into wilderness : therefore the most prudent and politic law-makers have thought it most convenient, that betwixt these two extremities a middle and even course should be taken, whereby property might be retained, and yet community preserved. Plato, because once he was of opinion that all things ought to be common, hath therefore many blows of his scholar Aristotle writing against him in his politics, in which book he hath a learned difference, that all that be common *χωροι* in use but not *κτησι* in possession and title, which notwithstanding is ~~not~~ generally and indefinitely to be admitted, because then it tendeth to the overthrow and utter subversion of all common-weals : But Plato being after better advised did retract his former opinion, and laboureth to confute it : for in his Book of Laws he writeth in one place, Let every man have the free use and possession of his goods by law, whether he be citizen or stranger, * and in another place : The

* Plat. lib. 8. de legib.

distinction of demesnes, inheritances, and titles, is the foundation of all private contracts, which must be severely established by law: therefore *meum* and *tuum* ought to be in every common-weal*. And again, let the inheritances and properties of things be definite and certain in every common-weal, and let a certain manner of purchasing them be prescribed by law†. Thus it is evident that a distinct property of things is commodious and convenient for the good administration of a common-weal: It is of two sorts, either an absolute and indefeasible property, or else a qualified property and *sub modo*. An absolute property is such which is not in any sort subject to the claim of any other: but a qualified property is that, which one man may claim after one sort, and with a certain limitation, and another may claim after another manner, and without limitation: As if a man hire beasts of another to manure his land for a certain term, he that hireth them hath a property in the beasts

* Plat. lib. 12. de legib.

† Plat. lib. 11. de legib.

pro tempore, and therefore if the beasts during the term be taken away, he may have a general replevin*: So he may have of beasts which be in his custody and were committed to his keeping†: And so he may have a general writ of trespass for the taking or driving away of beasts in his custody, though the absolute property be in another man: But if he which hath the very property doth take them, an action of the case will only lie‡. And the bailee of corn or money, being out of sack or bag, hath so far forth a property in the thing delivered, that if the bailee be afterward attainted of felony, he shall forfeit the corn and the money: for it cannot be known whether they be mine or no§. And the lord may have a replevin of the beasts of his villain, or bondman, if he hath been seised of his villain¶. And it appeareth

* 42. E. 3. 18. 11. H. 4. 17. 17. E. 4. 2.

† 47. E. 3. 12.

‡ 48. E. 2. 20. 11. H. 4. 23.

§ 3. E. 3. Corone 317. 323. 334.

¶ 42. E. 3. 18. N. B. Fitz. 69. 9. H. 6. 25. per Bab.
19. E. 3. Replevin. 32. 33. E. 8. Rep. 43.

by divers books, that in an action of trespass, it is no plea to say that the property, that is the very property, is in another *. And it is said likewise, that he out of whose possession goods are stolen, may have an appeal: and he likewise may have an appeal who is the very proprietary†. And therefore it is a firm conclusion in law, that if sheep be delivered, or leased to one for a certain time to marle his ground, the delivery or demise is a good plea in bar of an action of trespass or replevin, because he hath a property *modo & forma* against the bailor himself, or lessor, and may have an action against him for taking them away within the time‡.

2. And as the property of things may be particular or general, so likewise it may be joint or several: A joint property is where two or more are jointly interested in a thing: A several property when they have several interests in several things: and therefore where the property or right in

* 12. H. 6. 19. 27. H. 8. 21.

† 19. E. 5. Replevin 32.

‡ 21. H. 7. 14.

goods and chattels is joint, there the action which is brought to try the property must not be several: And therefore in a writ of ravishment of ward, the defendant said that the plaintiff had nothing in the seigniorship but only in common with such a one, and this was held a good plea, without saying that he had nothing in the ward in severalty, or without shewing how he held in common in parcenary or by joint-tenancy*. And so if the property be several, the action must not be joint but several: And therefore if in a writ of replevin brought by two for certain beasts, if the property of some of the beasts belong to one of them only, and the property of some of the beasts to the other, the writ shall abate†. Thus it is evident that the law doth maintain and uphold the joint and several property of things, without which the common-weal could not exist. Now let us consider how the community of things is likewise respected by law.

* 6. H. 4. H. 12. H. 6. 4. 22. H. 6. 14. & 1. E. 4. 7.

† 28. E. 3. 92. 3. H. 4. 12. 34. H. 6. 37. 2. E. 4. 23. 10. E. 4. 2. 8. E. 3. 15.

*Omnia possidet, non possidet aera Minos **,

Though Minos all things do possess, the air is
not his own,

And the shore of the sea is by nature common to all, as Neralius saith†, and though empires and kingdoms be divided, yet the use of such things remaineth still in common, and therefore the saying of Maro in the person of one of his travellers was uttered with good reason :

*Quod genus hoc hominum quævis hunc tam barbara merem
permittet patria ? hospitis prohibemur arena.*

But yet to enemies, because in them the league of friendship doth fail, the right of fellowship should not be granted. For grossly are they deceived, who would without restraint have all things common, of which error the Anabaptists are patrons, and do endeavour to ground their error upon scripture, but falsely, for Abraham and the Patriarchs were men of great riches : Joshua did publicly and privately

* Ovid. in Metamorph.

† c. 14. tit. Digestor. de acquirend. rerum donat.

distribute his goods to the people of Israel. There be in Solomon precepts of the property of things. And God would not have said, Thou shalt not steal, if he would have had all things common: for to steal, is to take away goods wherein others have a property, and therefore theft is said to be *contrectatio rei alienæ animo furandi, invito illo cujus illa res est* *.

3. But yet the rule of charity and society requireth that some things should be in regard of use and benefit common to other, and therefore by customs of countries, and by law, the offspring of these customs, the earth is in part appropriated unto some, and in part participated and made common to others. Therefore the common law doth well allow and maintain the common use of certain things, as namely, the use of fishing in another man's pond, † of pasture for his beasts in another man's soil, ‡ of taking of an estover

* *Stamf. fol. 24.*

† 18. H. 6. 29. & 92. 17. E. 4. 7. 7. H. 7. 13. 18. E. 4. 4.

‡ 9. H. 6. 36. 27. H. 6. 10. 15. E. 3. Common. 12.

or maintenance of wood in another man's grove, * of having a franchise and liberty in another man's manor or seignior, † and lastly, of having a way through another man's ground ‡.

4. Some things there are, the property whereof the law cannot vest in any, and therefore it leaveth them to the occupant; that is in plain terms to him that can seize them, as things which are by nature *feræ naturæ*, as beasts, birds, or fishes, being in their own liberty. And as to the property it is not material whether they be taken in a man's own ground, or in another man's, and such things be his no longer than they be in his possession or custody: for when they have escaped and recovered their natural and pristine

22. Ass. pl. 36. 36. Ass. pl. 3. 4. H. 6. 13. 37. H. 6. 34.
4. E. 4. 29. 10. E. 3. 15. 10. E. 3. 56. 4. E. 3. 4. 15.
Ass. pl. 6. 14. E. 3. Barre 277. 17. E. 2. Common. 25.
22. H. 6. 54.

* N. B. Quod. permit. 11. Eli. 281. Dy.

† 13. 8. 45. 10. H. 7. 13. 7. E. 4. 10. 48. E. 3. 17. 80.
E. 3. 20. 3. H. 6. 12. 34. H. 6. 43.

‡ 33. H. 6. 26. 8. E. 4. 9. 6. E. 3. 23. 2. E. 4. 9. 20.
E. 3. Admeas. 8. 20. E. 3. 2. 13. H. 4. 82. 2. H. 4. 14.

liberty, then they cease to be his, but the law understandeth such things to have recovered their natural liberty, when they are either past the view, or else being in view they be hard to be followed, and recovered. The nature of bees is wild, and therefore when a swarm of them lighteth upon thy tree, they are no more thine before they be covered with thy hive*, than hawks, which have made their nests in some of thy trees, or doves in thy dove-house; for though the young birds be thine, whereof thou mayest bring an action of trespass, *quare vi et armis pullos accipitrum suorum in bosco nidificantium*, or *columbas columbaris sui cæpit*, which writ is not only maintainable, when the dove-house is broken, or the door open, and the young doves be taken out of their nests, but an action of trespass will also lie for the troubling or hurting of the old doves within the dove-house, though they be *feræ naturæ*, as well as for chasing and killing conies in a man's warren†,

* Justinia. lib. Institut. 2.

† 16. E. 4. 7. 22. H. 6. 6. 67. 18. E. 4. 8.

yet he shall not use this word *suos*, * in his writ, yet because he hath them by reason of his warren or dove-house wherein he hath a property, he shall have an action for the chasing or the taking of them. † The nature of cranes and doves is wild: neither is it material that by custom they are wont *avolare et revolare*, to fly from home, and return home. And in such things which are tame, and by custom are wont to depart and yet to return, this rule is allowed, that so long they may be said to be thine, as they have *animum reverendi*. And felony cannot be committed in the taking of beasts that be savage, if they be sayage and untamed at the time of the taking, nor for taking of doves being out of a dove-cote, nor for taking of fishes being at large in the river, for such taking is not *contractatio rei alienæ sed quæ est nullius in bonis*. ‡ And the stealing of a doe which is tame and domestic is felony,

* 43. E. 3. 24. 12. H. 8. per Newdig. 14. El. 307. Dy.

† 8. E. 4. 5. 22. H. 6. 55. N. B. Fitz. in le bre de trespass.

‡ 18. H. 3. 2. 22. Assis. pl. 95.

but then saith M. Stamford, it seemeth that he that stealeth it should have certain knowledge that it is tame*, but if the doe be killed and then stölen, this is felony. † And though a man may have for the taking of his ferret an action of trespass, because he is profitable to take conies for the use of his master, yet because a ferret is *feræ naturæ*, a man cannot have an appeal of felony for him, no more than he may have for the stealing of his hawk and popinjay, or such like, for such things are *feræ naturæ*, and a man can have no property in them, neither can he say in his writ *feras suas*, for that implieth a contradiction, and because they are savage therefore they are not tithable. But when such things are made tame by my labour and cost, the property of them is changed, and the nature altered, and then if a man take them out of my possession, I may have an action. For a man may have an action *quare molossum suum cepit*, because he is necessary for the keeping of his

* Stamf. lib. 1. c. 16.

† 10. E. 4. 15.

house, or the keeping of his fold, or a fish-pond. * But the nature of hens and geese is not savage, and therefore if they shall fly away, though they be past thine eye-sight, notwithstanding in what place soever they be, they cease not to be thine: and whosoever detaineth them, is punishable by way of action†.

4. In the civil law there is this case, certain sheep were carried away from the shepherd of *A.* by wolves, an husbandman of the next village having pursued them with great and strong dogs which he kept for the safety of his beasts, recovered them from the wolves, for the dogs did enforce the wolves to leave them, and when *A.* did demand the sheep, the question was, whether the sheep became his that did so recover them, or remained still the sheep of *A.* for the dogs did get them by a kind of hunting: yet Pomponius thought in this case, that as those things which are taken either on sea, or on land,

* 12. H. 8. 3. Fillowes C. per Brooke. Pollard. Brudaell. Newport and Newdigate.

† Justini. lib. Institution. 3.

do cease to be theirs that took them, when they are come to their natural liberty, so by the same reason our goods taken away with beasts living either in the sea, or on the land, do cease to be ours when the beasts that took them have escaped our pursuit. And who will affirm that that continueth to be ours which a bird flying hither and thither carrieth out of our barn, or out of our field, or by any means carrieth it away from us, if therefore it cease to be ours when it cometh to the mouths of beasts, in common appearance, irrecoverably, it must needs become his who first recovereth it, and so be made proper to the occupant, even as a fish, or bird, which hath escaped our power, if it be taken of another, is straightway his, but he thinketh it more reasonable that it should continue ours, so long as it may be recovered*.

5. Likewise a thing *pro derelicto habita*, waived and forsaken, is *nullius in bonis*, as when a man for fear of a tempest casteth his things into the sea, or some danger be-

* Ulpian. li. 19. ad. edictum.

ing imminent, leaveth them upon the land, or else of his own free-will leaveth that which is his own *sine spe rehabendi*. * If a thing be fallen out of a chariot or waggon, it may be said to be lost or waived. † And if a man have a liberty to take waifs and strays in his manor by prescription, and certain beasts be waived or do stray within the precincts of his manor, and a stranger taketh them, he that hath the manor shall not have an action of trespass general for the taking of them before he hath seised them, ‡ though the law be taken to be otherwise by some§. But 13. E. 3. a writ was maintained by an abbot by reason of his franchise in the like case, but that was an action upon the case, which proveth that the property was not in him before seisure ||. But it hath been held for clear law, that felony is not committed in the taking of treasure found,

* 29. E. 3. 19. 12. E. 4. 5.

† Ulpia. li. 56. ad edictum.

‡ 16. Eliz. 138. Dyer.

§ Ibid. & Fi. N. B. 19.

|| 13. E. 3. Briefe 678.

wreck of the sea, waif and stray, and such like, unless they have been before seised, and the reason is, *quia dominus rerum non apparet, ideo cujus sunt incertum est*; and therefore the punishment in such cases is by fine, and not by the taking away of life and member. * Such lands, the property whereof hath been executed by possession, cannot be waived but by matter of record. † And it is a certain rule and sound reason, that such things as cannot pass but by matter of record, cannot be waived or relinquished, but by matter of record ‡.

6. Such things are said to be *nullius in bonis*, which have not from time out of mind been known to belong to any man, as treasures hid in the earth, as when any money, gold, silver, plate bullion is found in any place, and no man knoweth in whom the property is, the law bestoweth it upon the king, and it becometh *res fiscalis*, parcel of the treasury royal, and therefore

* 22. Assis. pl. 99.

† 7. E. 4. 7. & 20.

‡ 3. H. 4. 13.

it is called in the common law *treasure trove*, that is to say, treasure found, whereby it appeareth, that the king is not proprietary of it, till it be found, but it is before *nullius in bonis*. But if any mine of metal be found in any ground, that always pertaineth to the lord of the soil, except it be a mine of gold or silver, or a mine which hath veins of gold and silver, which shall always be the king's in whose ground soever they be found: * and in ancient time, as M. Bracton saith, it belonged by the law of nature to him that found it: but now by the law of nations it is *res fisci*, and belongeth to the king: but heretofore it hath been ruled *quod thesaurus non competit regi, nisi quando nemo scit quis abscondit thesaurum*; † for then (as M. Stamford collecteth) it shall belong to him in whom the property was before, and if he die before such finding, his executors shall have it. ‡ And because there

* *Exposit. des termes de ley*, Plow. in le cas de informas. pur mines.

† Fitz. Corone 446.

‡ Stamf. lib. 1. cap. 42.

might befall some square or variance betwixt the lord of the soil and the king; about the property of such treasure, it is therefore decided *quod thesaurus competit domino regi et non domino libertatis si non sit per verba specialia aut per prescriptionem**.

7. And things are said to be *nullius in bonis* by common consent, as things consecrate and religious; for, though the goods belonging to a church, as bells, service-books, surplices, chalices, and other things, must be supposed in a writ of trespass brought by the churchwardens to be *bona parochianorum in custodia nostra existentium*. † Yet in that the law giveth the action to the church-wardens, and to their successors, for the recovery of such goods unjustly taken, and doth give the property to the parishioners, this property must be intended to be to the use of the church, that is, to the parochians, as they are the church: for, though it be

* Fitz. Corone 281. 436.

† 8. E. 4. 6. 37. H. 6. 30. 12. H. 7. 27. 8. H. 5. 4. 11. H. 4. 12. 19. H. 6. 66.

true that Rolfe saith, 8. H. 5. that a church parochial cannot otherwise be intended, but a house made of stones, and walls, and roof, and such material things which cannot take by gift or feoffment no more than a church conventual which lacketh a sovereign: *yet it cannot be denied that the parishioners are incorporate for the purchasing of personal things, and that in regard of such capacity, they may be said to be the church itself, as well as the parson and his successors, in ancient time, were said to be the church in the purchase of land and realties, which may appear by this case: Land was devised to one for life, the remainder to another for term of life, the remainder to the church of St. Andrew, in Holborn, this adjudged to be a good devise, †and this must needs go to the parson and his successors, because the church-wardens and parishioners were never admitted by law to purchase land to the use of the church. And Belknappe said, that the cloaths of a dead man being found dead in the field, did be-

* 8. H. 5. 4.

† 21 R. 2. Devis. 27.

long to his executors, if he had made a will, otherwise that they should be delivered to the church for celebration of divine service for the soul of the dead: for his meaning is (as I take it) that the ordinary should intermeddle with them for the disposing of them. * And if a man take a coat-armour which hangeth over a dead man's tomb in a church, the indictment must be *bona executorum*, of the dead man: but if a grave-stone be taken away, the indictment must be *bona ecclesiæ* †.

* 48. E. 3. Indictment 27.

† Lambard Eizenarc. 494, 495.

CHAP. VIII.

**THAT THE WORDS OR TERMS USED IN
BOOKS OF LAW OUGHT TO BE UNDER-
STOOD AND APPLIED AS THE LAW DOTH
EXPOUND AND CONCEIVE THEM.**

IT is not possible for a man to be skilful in any science, unless he do perfectly know the words which do occur and are often used in that science. I do not mean words of art only, which by Lexicons and explanatory books may easily be conceived, but such as do import and concern the objects of the science, about which it is principally conversant. To pursue, therefore, briefly an interpretation of such words as in the law are material. I take it not to be dissonant from order to begin

with the diversity of laws, and to shew how these words, the law of nature, the law of nations, the law civil, the common law, the statute law, the customary law, *jus-mcrum*, and *equum et bonum*, are used in the law books, and are to be understood, that so it may be known how and in what sort one law differeth from another, and of what quality and condition that law is to which the student is addicted, or upon which he doth ground his reason. The law of nature therefore is, that which the nature of natures, or the God of nature of the philosophers called *Natura Naturum*, hath taught all creatures that have sense, by the mediation of nature created of which they consist: for this law is grounded in the root and inward parts of nature, and therefore one sayeth well, *Habemus non scriptam sed natam legem, quam non didicimus sed hausimus*: This is according to Justinian's definition, in his Institutes, to whom D. Hotoman may seem at first to do injury, by objecting, that by this definition, to eat, to sleep, to move, and to rest, are parcel of

the law of nature: and though this be answered by some, * that these things are excluded from the definition, by this word *Jus*, yet what absurdity would follow, if such things should be granted to be parcel of the law of nature, why not as well the repulsion of force, which apparently proceedeth from the law of nature? For in truth there is no difference in the effect betwixt external force, and the force which a living creature having sense should do to itself, if it should not perform these aforesaid actions of nature, as to eat, to sleep, to move, and to rest, whereby nature is preserved and kept in time. This is plain in men, who by the civil law are said to kill, in denying nourishment to themselves, or others, whereby life and nature may be maintained. And Josephus writeth well, that it is against the nature of living creatures for any of them to kill itself. † But D. Hotoman doth further cavil, following his fore-father Valla, that law cannot be applied to beasts, no more than injury may

* Gou. li. 1. lect. jur. c. 19.

† Joseph. de bel. Jud. li. 3.

be done unto them. To this may be replied, that injury in some sense may be done unto them; if injury be taken for that *quod jure non fit*, which is not done according to that law, that is prescribed unto them by nature. But if it be done according to the rule of nature, though it differ from the nature of all other things, yet it is not injurious or unnatural, for example: All birds except the cuckoo, do foster and bring up their young, these do it by the law of nature, this doth it not by the law of nature, and yet doth no injury to her young, because she doth it by the instinct and privilege of nature. This law is of all most ancient, being connatural unto us, and following immediately and indissolubly the very principles of nature created, being an even level, and most just law in itself, though wrested and corrupted by the corruption of things: but in what kind soever it is uniformly executed, it is without all blemish of injustice, as in mankind it is uniformly apparent, that every man is inclined by nature to provide for pos-

terity. But when some provide too much, some too little, some with pinching for themselves, some in seeking to make their children far greater than themselves, this is not uniform, this therefore is unjust: neither do I dissent from the opinion of them that think the laws of Moses do imitate and resemble the simplicity, integrity, and uniformity of the law of nature.

The law of nations is that which natural reason hath propounded and appointed in common to all men: I do not say that nature hath appointed, but nature with reason, or natural reason. And it is also severed from the law of nature, because it is appropriated only to men, yet communicated to all nations, for there is no nation which useth it not. The distinguishing of demesnes, the diversity of realms and kingdoms is parcel of the law of nations. Likewise wars, contracts, and such like, are branches of that law, the definition of it may be shortly this, a law in which all nations do consent. But this pleaseth not Bodinus, for saith he, all nations have

consented to idolatry, yet who will account that a law? * But this definition is meant of human things, not of divine, for who will so understand it? For all the nations of the world may not prescribe a law to God, nor capitulate any thing touching these things which concern him, he is a law-maker for himself, and therefore hath said, *Quod præcipio tibi hoc tantum facito, non addas, nec minuas* † But in human things that which all nations do allow for a law, that is for government and public respect, (for which intent the word law is used in the definition) that is to be received and acknowledged for the law of nations.

The law civil I do not take so largely as some do interpret it, to be a law which every city or people hath appropriated to itself: for though the original denomination of it came from this word city, yet by that was meant only one city, where that law was practised and observed, and that was the ancient city of Rome, for which

* Bodin. lib. de Repub.

† Deut. 12. v. 32.

cause the civil law is at this day called by some *Jus Romanum*. * And though many cities and common-weals be now governed by that law, yet therefore it cannot be said to be *Jus Civile*, since it had the name before.

The common law is that which by common use or common reason is made, not by common assembly, as statutes or acts of parliament are established: And it differeth likewise from statute-laws in this, that in such laws there are many times provisoes and exceptions of certain persons. But the common law bindeth all alike, and is not applied and used as a plaister to one part, but as a strong purgation to all the parts of the body politic; and it may challenge a third difference, for that the common law ariseth from the people and multitude, but the statute originally from the king, because before every parliament, writs of summons issue from the king for preparation to that solemn meeting of the states. Again, the king may dispense with

* Alber. Gent. lib. lecti. & epistolar. 2. c. 14.

penal statutes, * by clause of *non obstante*, but he may not alter the course of the common law, † though the word of common law extend by the generality of it, to any law that is commonly used in any place, yet use hath restrained it to the law of this realm of England, to the dominions of which it is confined, and beyond this nest stretcheth not her feathers.

The customary law is nothing else but a custom long time continued, which may be thus more fully defined; custom is a law not written, by the manners and usage of certain people or the greater part of them upon good reason and judgment, begun and continued, and having the force of a law. I said (a law not written), because the bare memory of man is the register of customs. I said (by the manners and usage, &c.), because no custom doth grow without the consent of certain people, or the major part of them. I said (begun upon good reason and judgment), because such things as are introduced by error, are

* 34. H. 8. 25. Dy.

† 11. H. 4. 13.

not to be observed. I said (continued), because without diuturnity of time, custom can have no force or strength. I said (having the force of law), because it must be of equal power in the place where it is used with the law. A custom against the law of nature is of no force, because *naturalia sunt immutabilia*: A custom against the law of nations is of no validity, because that is grounded upon the law of nature. A custom against the law positive is either against public utility or private profit, if it be derogatory to public utility, it is void: if it be only against private profit it is good and effectual, and a custom only disallowed and defeated by law, cannot be recontinued or revived by any means. It hath been questioned how many acts or deeds of men be required to bring in a custom; and the opinion of the most learned hath been, that so many acts and so notorious, that the thing which is done may be intimated into the notice of the people, so that it may seem to be allowed by the secret consent or liking of the people. But one notorious act cannot

induce a custom, for that is against the name of a custom: for *consuetudo* is nothing else but *communis assuetudo*. It hath been also doubted, whether an act contrary to a custom do interrupt the custom: to which it may be thus answered, either the custom was not yet perfect, and then it doth interrupt the custom, for the consent of the people did not yet evidently appear, or else it was complete and perfect, and then it cannot be defeated by one act, but by so much time and in such manner as it was induced.

Jus merum is that law which hath no mixture nor regard of circumstances, but groundeth a rigorous conclusion upon things done, without further examination how or why they were done, as if a man sell a lease of land for years, and certain cloth for ten pounds, the contract is entire, and if the title of the vendor be not good as to the lease, yet he shall have the entire sum, though the vendee be dispossessed of the lease, at the time of the action brought for the money, * because in strict reason the contract was

* 24. H. 8. Br. Contract 35. v. H. 7. 4.

entire; so if a man sell his own horse, and the horse of *J. S.* to *A.* for ten pounds, and *J. S.* taketh away his horse, yet an action of debt will lie for the whole sum, because the contract was in itself entire.

* But if a man retain one in service for a year, for ten pounds, to be paid at two feasts of the year, and the master dieth after the first feast, and before the latter, the servant shall have his wages but for the first feast, because the contract was at the first time apportioned†.

The law which is termed *æquum et bonum*, is that which doth mildly interpret, amend, and molify the hard and rigorous speeches, and censures of the other laws: and is sometimes sharp and severe, where other laws are remiss and connivent: as may appear from that saying of Salust, sentencing the proceeding of the Romans in a matter of estate *fit reus magis æquo bonoque quam jure gentium Bomilcar comes ejus qui Romam fide publica vene-*

* 30. H. 8. Br. Apportion. 7.

† 37. E. 3. Br. Apportion. 6.

rat, and this is not so much comprehended in writing, as in the true understanding of that which is written. It is necessary by the judgment of another law, which saith *etsi nihil facile mutandum est ex sollemnibus, tamen ubi æquitas evidens poscit subveniendum est*. * And again, *justus Judex æquitatem solutius sequitur*. † This ought to have place sometimes in the precepts, rules, and cases, of the civil and common laws: yet it hath more affinity with the law of nature, and the law of nations, which are ignorant of the knots and intricate points of these aforesaid laws.

Now that we have discoursed of these several laws, it remaineth that we should shew what things are the principal objects of the law, which may be reduced to two heads, for either they are real or personal. That which is real, is either land, or that which issueth out of land: land is either firm and fixed earth, or that which

* L. 183. de Reg. jur.

† L. 14. de Reg. jur. § de relig.

is immediately and coherently annexed to the earth, as houses. By the differences of this division a piscary or fishing is excluded, whether it be *libera piscaria*, that is a liberty of fishing in another man's ponds, or waters, which he hath in common with others. For twenty persons may have a fishing after that sort in one river, and it is therefore called *libera*, because none may disturb them to whom the fishing belongeth: * Or *separalis piscaria*, which in our books hath several significations, for either it may signify a several fishing, which one man alone hath in another man's soil. † Or else where a man hath a several fishing to himself in his own ground, and so it is a thing compounded of water and of earth, and therefore it is said, that where a grant is made of a stagne or piscary, the land passeth. ‡ And in a formedon brought of a gorse, which in Latin is called *gurges*, a gulph or deep. Yarmouth, wherein fishes are

* 17. E. 4. 7. † 18. H. 6. 29.

‡ 4. E. 3. 3. Feoffment 79.

commonly taken, the demandant shall recover the land and soil itself. * And it hath been adjudged that a fishing so taken lieth in tenure. † And a writ of *aiel* was brought of a fishing as a thing lying in demesne. ‡ And also of a stagne or pool: § But it cannot be termed land, because the water is not coherently fixed to the soil, but otherwise it is of an acre of land which is covered with water: for though that be overflowed with water, yet it is not naturally overflowed, as a pond or fish-pool is. ¶ And therefore it is said, 12. H. 7. that a man may have a *Præcipe de una acra terræ cum aqua cooperta*, or *de una acra terræ* generally at his election. ¶ But a tenement cannot be said to be freehold except it touch the earth, and therefore a chamber built upon a hall or parlour, cannot be said to be freehold, because it can-

* 14. E. 3. Formedon 34.

† 40. E. 3. 44.

‡ 20. E. 3. Bre 685.

§ Temps E. 1. Bre 861.

¶ 18. E. 4. 4.

¶ 12. H. 7. 4.

not be perpetual, for the foundation may perish, and for that cause it cannot be demanded by plaint or writ. * Yet 9. E. 4. an exchange was made of land for a chamber, † but that proveth it not, to be freehold, for an exchange may be of things of divers natures, as of land for rent. ‡ And so of a rent for a common. § A castle, whether it be a thing either of itself, or parcel of a seigniory or manor, may well be called land or freehold. ¶ For though land may not be parcel of land no more than one leet or hundred may be parcel of another. ¶ Yet land may be parcel of a manor. ** And a park may be parcel of a manor ††. And land may be parcel of an honor, ‡‡ and of a castle §§.

* 3. H. 6. 1. Plaint 11.

† 9. E. 4. 40.

‡ 3. E. 4. 10.

§ 9. E. 4. 21.

¶ 7. H. 6. 36.

¶ 3. Ma. 1. Com. 168. Hille's Case, 7. E. 6. Com. 80. Partridg. C. 23. H. 8. B. Feoff. 53.

** 4. E. 4. 16. 42. E. 2. 22. 44. E. 3. 40. Feoff. 53. lib. Funda. leg. fo. 70.

†† 3. E. 3. Bro. Juris. 39.

‡‡ 26. Ass. pl. 60.

§§ 4. E. 4. 17.

It is now shewed what may properly be called land, and it is not impertinent to declare how many sorts of land, which we have before called *firm* ground, may be demanded by law, of which the law hath a several contemplation. Land, therefore, as it is subject to the consideration of law is sixfold, *arva*, *florida*, *consita*, *compascua*, *mineralis*, *infrugifera*. *Arva* is the arable ground which is tilled with the plough. *Florida*, the garden ground, which procreateth flowers, herbs, and all such things as the bee doth feed upon. *Consita*, is the woody ground which is thoroughly replenished with trees, plants, shrubs, and such like. *Compascua* is that which bringeth forth grass and fodder. *Mineralis* is that, wherein mines are contained, whether they be regal mines, as mines of gold or silver ; or baser mines, as brass, lead, copper, tin, coals, or the like. *Infrugifera* is that which is barren, and cannot be helped by manurance, as the soil where rushes, weeds, fern, and such things do grow, and it is good to know the diversity of these several sorts of ground, that when such

things are to be demanded by writ, they may be demanded by their proper names and kinds; and therefore if a feoffment be made of two roods of land, and after a house is built thereupon, and part of it is become meadow, parcel pasture ground, and parcel wood, the demand must be by the name of a house, meadow, pasture, and wood*, and there is a writ in the Register, *de minera plumbi et cujuscunque generis metalli cum pertinentiis*†, and *ruscaria* the soil where rushes do grow must be demanded by number of acres. ‡ And where a stagne hath been, or land covered with water, if the water be turned out of the course or dried, the land may be demanded by the name of meadow§.

That which issueth out of land, or the profits of land are of three sorts, natural, industrial, and artificial. The natural profits of land are such as do rise by the force and benefit of nature principally, and not by the diligence and labour of man, as apples, herbs, trees, and such like. Indus-

* 3. H. 6. 8.

† Regist. 165.

‡ 16. Ass. pl. 9.

§ 33. E. 3. Entre 80.

trial profits are such as do principally require the diligence and culture of man, which, unless it be continually applied, *natura nihil operatur*, as corn, hops, woad, saffron, and such like. Artificial profits are these, which are reserved, granted, or issuing out of land by the act of man, and the approbation of law, as a common of pasture, a warren, a rent, and things of like sort. Common of pasture is of four sorts; appendant, which is belonging only to arable ground, or to land that consisteth as well of arable ground, as of other things, as a manor or messuage, but the appendancy doth principally grow by reason of the arable, and therefore it belongeth to such beasts only as do manure or marle the grounds, as horses, oxen, kine, and sheep*. And if a man have common to certain arable lands in one village, he cannot use the common with beasts that manure his arable in another village. † And this ought to be intended of ancient arable ground, not of land newly improved.

* 37. H. 6. 34.

† 10. E. 3. 56.

* For continuance of time immemorial maketh the appendancy, wherefore if the arable land to which common is appendant, do by purchase come into the possession of the owner of the soil, in which the common is to be taken, the common is extinguished in his person : But if after the tenements be severed by alienation as they were before, the common is revived by some authority, † because the same ancient arable land to which before it belonged still continueth : But by some it is otherwise, because being once extinguished it cannot be *de novo*, and in an instant made appendant ‡.

Common appurtenant is where a man prescribeth to have common of pasture belonging to his land with all manner of beasts, it differeth from a common appendant in this, that a common appendant is only to be taken by such beasts as manure or marle the ground, and by such number of beasts as will serve to manure or marle

* 10. E. 2. Common 22. Ass. pl. 2.

† 4. E. 3. 45. 17. E. 2. Common 23.

‡ 14. H. 4. 2.

the ground, to which the common may be claimed, and belongeth only to them as long as they are demurrant upon the land : But a common appurtenant may be taken by all manner of beasts *. Likewise a common appendant must be only claimed by reason of land which may be marled or manured : but a common appurtenant may be claimed by reason of a messuage or house †. Furthermore a common appendant groweth only by continuance of time, and the essence of it is prescription joined with appendancy ‡. But a common appurtenant may be granted at this day, and springeth up in an instant §. And a common appendant cannot be severed from the land to which it belongeth || : But a common appurtenant may be severed ¶ : And they differ in this, that a common appendant must be used and taken, according to the rate and quantity of ground, in regard

* 37. H. 6. 34. 9. E. 4. 3.

† 22. H. 6. 43. 4. E. 4. 29.

‡ 26. H. 8. 4. 5. H. 7. 7. 4. H. 6. 13.

§ 26. H. 8. 4. 15. Assis. pl. 5. Common 13.

|| 5. H. 7. 7.

¶ 26. H. 8. 4.

of which it is granted or claimed *. But a common appurtenant may be claimed for beasts *sans nombre*: for by the opinion of Mombray none shall have a writ of admeasurement of pasture, but he that hath a common appendant †: So that it may be probably collected, that a common appurtenant because it cannot be admeasured, may be well enough *sans nombre*: And it may be likewise to a certain number of beasts, for if a man at this day will grant one a messuage with a common appurtenant for ten beasts, I doubt not, but this is a good common appurtenant to the messuage.

Common by vicinage is where two townships or more do intercommon, and have intercommoned from time out of mind, which is not to be used, by putting the beasts of the inhabitants of one town, into the lands of the inhabitants of another town, for so they may be distrained damage feasant: But they must put them in their own fields, and if they stray into the

* 15. Ass. pl. 5.

† 18. E. 3. 32.

fields of the other village, they must suffer them to be there, and they must put in their beasts, having regard to the freehold of the inhabitants of that village where the common is to be used *. This kind of common M. Littleton maketh appendant †, but by other authority it is a several and distinct kind of common.

Common in gross is where a man claimeth to have common for all manner of beasts, whether the number be certain or uncertain by special grant in writing, or by prescription in him that claimeth or his ancestors, or they whose estate he hath, not by reason of any particular land: and this common may he use by the beasts of a stranger, which the proprietary of the common may gist, as we term it ‡.

A warren is a profit likewise which may

* 13. H. 7. 19. 15. El. 316. Dy. 16. E. 3. Com. 9. 22. H. 6. 51. 6. H. 6. 70. Dyer.

† 7. E. 4. 26.

‡ 11. H. 6. per Babing. Mart. & Paston. 45. E. 3. 25. Assise 61. 36. Ass. pl. 3. 15. Ass. pl. 5. Perkins tit. Grants.

be taken out of other men's ground by prescription*, and if the owner of the soil or any one by his commandment, or as his servant, do come upon the soil, and do chase the conies, he cannot justify the chasing †, though he may justify his entry into the ground ‡. And a rent is also a profit issuing out of the soil of a stranger, and savoureth of the nature of the land, out of which it issueth, and therefore if rent issue out of land in ancient demesne, it is ancient demesne, and so it is of rent granted out of land in gavelkind, it shall be divided as the land itself §: And so it is of rent granted out of land devisable by custom, though the rent be granted but of late time ||. And so if rent be receivable out of customary land, as borough English, or where dower is to be had of the half part, and such like, the rent shall be of the custom and nature of the land, and therefore in the demand of such rent by

* 30. H. 6. 28. Dyer. § 4. E. 3. 53. 14. H. 8. 4.

† 3 4. H. 6: 43.

‡ 22. Ass. pl. 78.

§ 3. H. 6. 12.

præcipe, or in a replevin, the tenure by ancient demesne of the land is a good plea *. And so if land in tail be divided amongst parceners, the rent reserved to one of the co-parceners shall be in tail, and of the same condition as the land was †.

Personal things are things either in possession, or in action: Things in possession are either goods or chattels: the name of goods is natural and civil, by the natural signification all such things are comprehended under the name of goods; which may profit ‡. But as the name of goods is taken civilly, it stretcheth to the whole heap and body of a man's wealth, together with the charge and deductions: the reason of this difference is because nature considereth things as they are: but a common-weal or city after such sort as is most expedient §. And though the charge which followeth goods do detract somewhat from

* 14. H. 8. 5.

† 2 H. 7. 5. 15. H. 7. 14.

‡ 1. 49. De verb. signific.

§ Alber. Gentil. lib. 2. Epist. c. 7.

the value and estimation of the same, yet because it is to be discharged and satisfied out of the goods, it is therefore jointly reckoned and considered with the goods themselves.

Chattels, which in the common law are termed *Catalla*, are diversly taken, for the profits of land if they be given generally unto the king by act of law, they may be called chattels, and therefore the profits and issues of the lands and tenements of them which fly for felony are forfeited unto the king, until such time as they be acquitted, and that by the statute of Prerog. cap. 10. which sayeth that the king shall have *omnia Catalla talium fugitivorum*, and under the word *Catalla* is comprehended the corn which was growing upon the land, at the time when the forfeiture of the goods did begin to take place*. And if a man be outlawed in an action of debt, and the outlawry be returned, so that the writ issueth to the escheator to seise the goods, chattels, and

* 3. E. 3. Corone 3. 4.

land of the party outlawed, the issues of the land shall be taken to the king's use until he have sued his charter of pardon*: for an outlawed person shall not forfeit any land, but the profits only, as rent and corn, if he be outlawed in a personal action: Otherwise it is if he be outlawed of felony, for then the king shall have the escheat of the land, or the *annum; diem, et vastum* †. But if the profits of land be generally granted by the act of the party, then they are the substance of the land and do not pass without livery: And if a man grant the profits of land, the land itself passeth ‡. And therefore it hath been held by Fortescue and Danby, justices; that tenant in fee-simple may grant *vesturam terræ*, and the grantee shall have it after his death: But the tenant in tail, for life, tenant in dower, and tenant by the curtesy cannot make any such grant, but if they die the grant is determined §. And if

* 8. R. 2. Superredecas 19.

† 9. H. 6. 20.

‡ 14. H. 8. 5. 45. E. 3. 90. 4. El. 210. Dyer.

§ 37. H. 6. 30.

a feoffment be made of land upon condition that neither the feoffee nor his heirs shall take the profits, the condition is void, and the feoffment simple and absolute*, and in such cases the profits of land may not be termed *Catalla*, no more than the lands themselves: But under the word chattels, a lease for term of years is comprised†. And likewise a right of action for goods: as if goods be taken wrongfully from a felon‡: Or when one is indebted to a felon by bond§: Or when he is accountable to a felon by reason of any receipt, or otherwise||.

Things in action are such in which a man hath neither property nor possession: as if a man do owe to another twenty pounds upon a writing obligatory, though he have a property and possession in the writing or charter, yet the sum contained is a thing in action, in which he hath neither property nor possession: and so it is

* 21. H. 7. 24.

§ 19. H. 6. 47.

† 39. H. 6. 35.

| 28. E. 3. 92. & 50.

‡ 6. H. 7. 9.

¶ 1 H. 7. 15.

of an advowson when the church is void of an incumbent: for the patron cannot grant it to any other, because then he should grant but *fructum advocacionis*, which is a thing rather imagined by law than subsistent by nature: and therefore the patron cannot truly be said to have property or possession in it. But though such things be to some intent merely in action, yet in some cases they are taken as things vested: and therefore if a man be seised of an advowson, and the church become void and he dieth, his executors shall present and not the heir *, for the advowson in regard of the executors was a chatel vested in the testator. The king may grant things in action †, and so may a common person in some cases: As if a man bring an action of debt against J. N. and the plaintiff is indebted to me, and promiseth me that if I will aid him against J. N. that I shall be paid out of the sum in demand: there it is lawful for me to aid and maintain the plaintiff against

* F. N. br. 34.

† 2 H. 7. 6.

J. N. because by the promise I have interest in the sum demanded *. And where a man is indebted to me in twenty pounds, and another oweth him twenty pounds by obligation, he may assign this obligation and debt to me in satisfaction : And I may maintain suit for it in the name of the other.

* 15. H. 7. 8.

A TABLE

OF CERTAIN WORDS, IN THE INTERPRETATION WHEREOF THE COMMON LAW OF THIS REALM AND THE CIVIL LAW DO SEEM TO AGREE.

A.

ACCUSATIO, a bill of presentment, is a regular form of complaint, whereby offences are opened and punished.

Acquisitum, purchased; that is said to be whereof the property is translated from one to another.

Affines, are the kinsmen of the husband and the wife by marriage, so called, because two kindreds which are divers one from the other, are coupled by marriage, and one of them cometh to the borders or marches of the other kindred.

Ad nos pertinere, is said that which doth belong unto us, either by way of property, or by way of possession, or by charge, or by administration.

Ædes, (plural); a house consisting of divers rooms, (for *domus* may consist only of foundation, wall, cover) as the integral parts, or as some briefly say, which consisteth of soil and superficies.

Æstas, summer; a part of the year, which beginneth at the equinoctial of the spring, and endeth at the equinoctial of autumn, and so summer and winter are divided by six montha.

Annona, victual; is not referred only to corn, but to the meat of the shambles, as well to fish as flesh.

Aperta vis, open force, which is manifest and evident, and doth not receive any excuse of simplicity.

Arbor vento dejecta, hath not now the name of a tree, but the name of wood.

Arbor dum crescit, lignum cum crescere nescit.

Area, a floor, is a vacant place, therefore

called *Area quasi exaruerit*, and were not able to bring forth any thing, it hath been taken to be such an empty place as doth lie discovered, *locus ab ædificio purus*, and hath no superficies: it is called a plot of ground, court or yard.

Argentum, silver; it is of three sorts, *infectum*, *factum*, *signatum*. *Infectum* is that which is unpolished and not adorned with any particular form, being in the ore, or bullion, newly severed and singled from the ore. *Factum*, is that which is beautified with some particular form, of which kind is a silver cup, a silver goblet, a silver bowl, or a silver mazard. *Signatum*, is that which beareth some special image or impression, and such is the silver that is coined and accounted current. *Argentum factum* must be described by the kind or shape, *Infectum* by the weight, *Signatum* by the number.

Arrestare, is by the authority or warrant of the law, to hinder that either a man or his goods be at his own liberty, until the law be satisfied.

Artifices, artificers, are they which sell things laboured by them, and by their labour reduced into a particular form, as shoemakers, smiths, glovers, tailors, and weavers; but *artificium*, if it be largely taken, extendeth to the knowledge of every art: *artifex* and *opifex* differ; for in the one there is labour and judgment, in the other labour only.

Assultus, an assault, is a violence done to a man's person, by the person of another man.

B.

Bona fides, a sincere conscience, excusing one of ill-meaning.

C.

Carcer, is taken two ways, for it is either *locus custodiæ*, or *locus pænæ*.

Cavillatio, when a man turneth his speech *ab evidentè veris, ad evidentè falsa*.

Cella, because there we do *celare*, we do

hide that which we would keep secret or close.

Civitas, a city; it is taken materially, and formally, being understood materially, it doth signify a multitude of houses made of stone and timber, being formally taken it is *civilis societas quasi societas simul vivens*, and not *vivens* simply, but *vivens bene*; for, as Cicero saith, *civitas sine legibus*, is *corpus sine anima*, and therefore Aristotle saith, *non concedimus ut homo imperit sed ratio*.

Cliens, is he that is in suit, so called *quasi colens*, and he who dealeth for him in the cause, is called *patronus*, *quasi pater*.

Codicillus, the declaration of a man's last will, which without the just solemnity of a testament, a man *ob impedimenti necessitatem* is inforced to write, but now the use of codicils or testaments are without any necessity confounded, which is contrary to law, for a codicil ought to serve necessity, and not a rash onset.

Cognatio, kindred; it is divided into three

parts:—1. into parents; 2. into children; 3. into cousins. Parents are they of whom we are begotten, as father, mother, grandfather, grandmother, and these which are in degree above them. Children are they which are begotten of our bodies, as son, daughter, grandchild, and such as be underneath them, *Et nati natorum et qui nascentur ab illis*. Cousins are they which have neither begotten us, nor been begotten of us, but have a common root and original with us, as brother, sister, uncle, aunt, and such as do descend from them.

Colludere, is in *fraudem tertii convenire*.

Commenda, the custody of a church committed and commended to some.

Commodare, is to grant the use of something for a certain time. There is difference betwixt *commodare* and *mutuo dare*, because *commodare* is to lend, to have the same again; as books, apparel, and such like, but *mutuo dare* is to trust, hoping to have the like again, as money, corn, salt, spices, and such like.

Compromissum, is the power that is given to the arbitrator, so called because both the parties do promise to obey the opinion of the judge, and therefore he is called *compromissarius Judex* to whom the matter is referred.

Communitas, a comminalty, is *societas hominum communi lege viventium*.

Conditio, when a thing dependeth *super casum incertum* which may tend either *ad esse* or *ad non esse*.

Confessio, is double ; either judicial, or extra-judicial ; judicial is that which is done before the judge, extra-judicial which is done in presence of good and honest men.

Consentire, is to meet in one opinion.

Constitutiones, judgments, rules, and awards concerning several matters whereupon this verse hath been made :

Quatuor ex verbis virtutem colligo legis.

Permittit, punit, imperat, atque vetat.

Controversum jus, is that which is on both sides doubtful ; *certum jus* is that which

is certainly determined and is called positive law.

Copulativa, the conjunction copulative is taken after two sorts, either in a divided sense, or in a compounded sense ; in a divided sense, as when I say, Sir Robert Brooke, and Sir James Dyer were Lord Chief Justices of the Common Pleas, for they were not chief justices together, but at divers times : in a compounded sense, as when I say two and three do make five.

D.

Debitor, is he of whom we may against his will exact money.

Decimæ, are of three sorts, *prædiales*, *personales*, and *mixtæ* : *prædiales* are they which arise of farms or lands, as corn, hay, and the fruits of trees : *personales*, which are due by personal labour, as by some trade, traffic, or mystery, *mixtæ* of which it may be doubted whether they be predial or personal, as wool, lamb, milk, &c.

Defensio, is the avoiding of a surmised and pretended offence.

Delegatus, a delegate, to whom a cause is committed to be determined and ordered.

De plano, vel sine figura judicii, vel summarie.

Deprehendere, is to take a man in *ipso facto*, so that he can never fly, nor deny the fact.

Descendere, to descend or to spring of ones body; hereupon they which are born of us are called by the name of descendants, which with them that ascend make the right line, and the ascendants and descendants cannot marry together, wherefore if Adam were now living he could not marry a wife.

Diæcesis, the government of a certain province by the bishop, for as a territory is so called, *quatinus Judex jus terrendi habet*, so a diocese as far as a bishop hath *jus administrandi sacra*.

Dispensatio, a release of common right, either *ex causa utilitatis, necessitatis*, or *ingentis prærogativæ meritorum*.

Diversa, such things whose subject is not alike, or whose definition is not alike.

Dominium, is a right to dispose perfectly *de re corporali*.

Domus instructa, a house furnished ; if a man devise such a house the household stuff passeth, but not the wine that is within the house, because by common intendment a house is not furnished by wine.

Dubia causa, is that which is but *semi-plene probata*.

E.

Error, an opinion, whereby that is approved and allowed to be true which is false, and that to be false which is true, and error may be two ways, either *in jure constituto*, or else *in jure quod quis in suo habet negotio*, the one is an error in law, the other *in facto*.

Evanescit actio, the action doth fail, or abate, *evanescit actio*, by the power of the law, or of the judges, *remittitur actio*, by the will of the plaintiff.

Executor, an executor, which is after three sorts, *executor testamentarius*, *executor legalis*, that is to say the ordinary, *executor dationibus*, the administrator.

Election, is the certainty of our will, it may be of persons, or of things, places, or times: Of things, as if a man should pay a sum of money, or else a horse or a hawk: Or of persons, as if he should pay it to *J. S.* or to *J. N.* Or of places, as if he should pay it at London, or at Lincoln: Or of the time, as the first day of April, or the second day of May.

F.

Falsitas, falshood, is *immutatio veritatis cum dolo et damno alterius*, the change of truth with falshood to the deceiving or damaging of another man.

Fama, is a common report, proceeding from suspicion, and published by the voices of men, and it differeth from rumour, because that is a divers whisper-

ing of men, which is not so effectual as fame. *Fama constans*, is that which is dispersed abroad neither by men unknown, nor of light credit, *nec ignotis nec improbis*.

Fidejussor, is he which bindeth himself for another, *quasi jussu alterius ponens fidem suam*.

Fortuitus casus, a mere chance which by man's counsel, care, and diligence can neither *prævideri* or *præcaveri*, be foreseen or foreclosed.

G.

Generalis lex, a general law, which comprehendeth all cases, except such as are unlawful, and unjust. For there is nothing more absurd than to draw a just law to an unjust interpretation.

Germani fratres, are they which are of the same father and mother. *Consanguinei*, which have the same father, but not the same mother. *Uterini*, which

have the same mother, but not the same father.

Gestores negotiorum, factors or procurators be of three sorts: *voluntarii*, which gratis and of their own accord do regard the business of their friend: *Necessarii*, which by obligation of their office do follow matters: *Quasi necessarii*, which have some colour to deal in matters.

Græca mercari fide, i. *pecunia numerata*, with money paid in hand.

I.

Illegitimi, bastards, whereof there be three sorts: *Incestuosi*, which be begotten of kinsmen and kinswomen within the degrees prohibited: *Nefarii*, which are begotten of descendants, the children of the same parent: *Spurii*, or *Adulterini*, which are born in adultery.

Injuria, whatsoever is done against law and right, whether by words or by

slander : or by deed, as by violence of hand.

Inops sine ope, without help, which hath no wealth or maintenance, whereby he may help himself.

Instaurare, is to bring a thing into his former estate.

Insula, a plot of ground compassed on all sides with the sea, *quasi in salo posita*. It is of two sorts : *Perpetua*, and *Nativa*. *Perpetua*, which hath been from time out of mind part of a province : *Nativa*, which hath been lately discovered by the ebb and drought of waters.

Interlocutoria sententia, which doth not define or determine the controversy, for that is called *sententia definitiva* : an award.

Judex limitaneus, which hath a limited jurisdiction, as the lord in a court baron who only holdeth plea of a sum under forty shillings, and within the precinct of his manor.

Juramentum, an oath, it is the affirming or

denying of a thing with religious assertion, or attestation, and it is double: Extrajudicial or judicial. Extrajudicial, as *juramentum conventionale*, when upon a bargain one doth swear to another. Judicial is of two sorts, *necessarium*, *et suppletivum*: *Necessarium*, which is *ad litem æstimandam*, when witnesses are produced by the parties. *Supplementivum*, when the judge doth enforce the party himself to swear for want of other proofs.

Inseperabile, that is said to be, which is so inherent in the subject, that it cannot be removed, but they do either stand together or fall together. A thing may be said to be individual or inseperable in many respects. 1. According to the form required in the act: And therefore if three be bound jointly, they must be sued jointly. 2. By reason of necessary depending, and therefore the principal being defeated, the accessary is also destroyed, because it cleaveth inseperably unto the principal: and therefore if the marriage be not lawful, the

endowment cannot be lawful. 3. By the meaning of the parties: as when a submission is made to two arbitrators, it is not to be imagined that the parties had an intent of severance. 4. By the nature of the thing: as when a thing will not suffer a partition: as a seigniorie in gross, a common, a condition, and so a jurisdiction is an entire thing: and therefore if a man will bring an action in a base court of a debt of four pounds, it is not good for thirty shillings, or a less sum: for a judge or officer hath a precise power of the law, and if he pass his jurisdiction, his sentence or act is void.

Integrum, is that which is compounded of divers parts, for parts compacted and joined together do make the whole, but an entire thing may be diversly: for it may be either *totum numerale*, consisting of many numbers linked together. 2. *Totum universale*, as the general nature whereof the particulars are comprehended: as *homo* of *animal*, *avis* of *brutum*. 3. *Totum integrale*, which is

made whole and entire by many parts, and it is of two sorts, *heterogeneum* and *homogeneum*: *Heterogeneum*, the parts whereof are not of the nature of the whole thing, as a house which doth consist of soil, stone, wood, mortar, and cover. *Homogeneum* which is of the same nature with the whole, as water, fire, earth, whereof every part hath the name of the whole.

L.

Lacus, is that which hath *perpetuam aquam*. *Stagnum*, that which hath water at sometime, and is sometime dry. *Fossa*, a receptacle for water, made by man's hand.

Lana, wool, which may be cloth, but yet is not wrought in cloth. And if a man by his will do devise his wool to any, be it wrought or not wrought, dyed or not dyed, or be it spun, it is comprised under the name of wool, and

it is called by the name of wool until it be made cloth.

Littus, that place to which the greatest flood of the sea doth come,

M.

Majestas, a sovereign honour : Majesty is said to be the daughter of honour and reverence.

Marinum et Maritimum do thus differ, *Marinum* is that *quod Mare incolit*, which lieth in the sea, or which is brèd in the sea. *Maritimum quod Mare accolit*, which is adjoining or adjacent unto the sea.

Mercator, a merchant, is not as some think termed a *merce*, but of the word *mercor*, which signifieth to buy, and they are properly termed *mercatores*, *qui res emunt quas in eadem specie carius vendant*.

Moneta, a *monendo*, money ; so termed because by the impression of the stamp

it doth give us notice, either of the prince whose it is, or the price which it beareth : It taketh *legem valoris*, the rule of the value of the superior, and therefore it cannot be abased or refused, but by the commandment of the superior.

Mortua res, that is said to be, by which a man is not richer.

Motu proprio, ex certa scientia, de plenitudine potestatis. are *prægnantes clausulæ*, clauses of importance, against which none may be heard.

Mutuum, quasi ex meo tuum.

N.

Narratio, a declaration of a matter, either *ore tenus*, or in form of law : If it be *ore tenus*, it is called a motion, and therefore it is said, *qui bene narrat, bene impetrat* : If it be in form of law, it is a declaration grounded upon a writ, containing the whole state of the matter, as the plaintiff supposeth it.

Naturaliter possidere he is said, who possesseth a thing corporally, and taketh the profits of the thing possessed, and this of the common lawyers is called *possessio in facto*: But if a man's father die seised, and the son doth not enter, nor actually take the profits, neither doth any other disturb him to take possession, this is called a possession in law, or *civilis possessio*.

Negotium meum, that is said to be, *cujus lucrum et damnum ad me pertinet*.

O.

Obventio, is a kind of revenue: it differeth from *Reditus*, being strictly taken, in this, that *obventiones* are *contingentium*, *reditus certorum*.

Oculis res subjici dicitur, when it is plain and manifest, it is well said of Erasmus, *ad cognitionem magis faciunt aures, ad fidem faciendam certiores sunt oculi*.

Officialis, an official who in a certain part of the diocese is the bishop's deputy.

Opera, labour ; it is double, *Officialis*, and *Artificialis*: *Officialis*, is that which is spent and bestowed upon the diligent attendance done by the servant to the master. *Artificialis*, is the labour of the trade, as printing, paving, sealing, gravings, embroidering, and such like.

P.

Pactum, is the consent of two or more in a matter which pleaseth both parties. *Pollicitatio*, is when there is not the consent of two, but only one agreeth. *Pactio nuptialis*, is a matrimonial contract. *Pactum retrovendendi*, is when the vendee covenanteth, that if the vendor or his heirs or executors will within a certain time pay so much money, as the vendee doth pay, that then he shall have the land again, and be in his former estate.

Palam factum, is that which is done openly. *Publicè factum*, is that which is done *coram populo*.

Paries, a wall, thereof there be divers kinds: *Lateritius*, which is made of clay: *Testaceus*, which is made of brick: *Cæmentarius*, which is made of lime, stone, and water mingled together: *Craticius*, which is made of wood, boards, or boughs, plaited together.

Paræcos, a parishioner, an inhabitant in a certain place, who hath brought his household to a certain place, to reside there.

Prætor Major, the mayor of a city, as Rhodigivus saith: for others are called *Prætores minores*.

Privilegium, is *jus singulare*, whereby a private man, or a particular corporation is exempted from the rigour of common law, for that which is now called *proprium*, hath been called of old writers *privum*.

Proprium, that which doth so belong to one that it is not common to another, and though that wherein we have a joint property with others may be called *nostrum*: yet it cannot be called *pro-*

primum, for *proprium* doth not admit any communion, but *proprium* and *sum* be equivalent, and of the same sense.

Puer, hath three significations, either it signifieth the estate of a man: as when we call servants *pueros*: Secondly, the sex, as when we call a male child *puerum*: Or else the age, as when we call one that is young *puerum*.

Pars, is that whereby the whole is supported; it is either *pars divisa*, or *pars indivisa*, this division will hold both in nature and law: In nature, that is a divided part, which consisteth of divers parcels: as the wing of a bird, or the cloven hoof of a beast, or the fin of a fish, are said to be parts divided: In law there is also a divided part, as the third part whereof a woman is endowed after the death of her husband, and after the assignment made, and the third part of the land of the tenant *in Capite*, which the king hath after his death: Likewise the

parts of a manor divided by parcellers: A part undivided is manifest to the understanding and to the eye: to the understanding, as the moiety or third part of joint-tenants, parcellers, tenants in common, before partition: to the eye, as the uncloven hoof of a beast, or the parts of the earth cleaving continually together.

R.

Ripa, a bank, it is proper to a flood, as the shore is to the sea. *Ripa*, is that which doth *flumen continere*, stay the natural force of his course, and that is said to be a bank, *quæ plenissimum flumen continet*, which stayeth the water, when it is at the highest.

S.

Sequestratio, is either a separation, by way of compounding, or by interdiction of possession: It is *voluntaria*, or *necessaria*. *Voluntaria*, when it is

done by the consent of the parties:
Necessaria, when it is done by one
that hath a competent authority to se-
quester.

Sylva cædua, which being cut may grow
again.

T.

Tugurium, *quasi tegurium*, it is taken
of some for every country house, but
not rightly, for the house which
doth consist of walls and tiles, or
brick, is no cottage; but a cottage
is that which doth principally consist
of reeds, or thatch, or sods, earth
and twigs laid together, and com-
pacted by clay or slime, or which
hath in it a very small deal of
timber.

Tumultus, is taken for every perilous
commotion, if it be publicly and has-
tily done.

Turba, a multitude, consisting at the least
of the number of ten.

V.

Vacillans testis, which doth give an inconstant and divers testimony.

Vagabundus, which hath neither certain house, nor stedfast habitation ; a man, as one termeth him, *sine re, sine spe, sine fide, sine sede*.

Vel, a particle, it doth not always define, but sometimes explain.

Vis, force or violence : it is of divers sorts, *vis detractiva*, when a man taketh a thing from one against his will : *Vis compulsiva*, when I compel a man to assent to a certain act : *Vis divina*, commonly called *vis major*, whereof there is no resistance : *Vis expulsiva*, which is done with weapon, and it is called of some *vis armata, vis inquietativa*, when I am disseised by force : *Vis imminens*, the striking or assault of a man. *Vis* is not *verbis*, but *facto*, for he is not said *vim pati*, which is only touched by words.

Universale quod ad universos pertinet.

CHAP. IX.

WHAT METHOD IS TO BE USED IN HANDLING AND DISPOSING MATTERS OF LAW.

OF method it were better to write nothing than little, for so many divers methods are proposed by many divers authors, that plenty breedeth scarcity, and a man can hardly tell which to choose. Curiosity, as in all other things it is vain, so in method it is necessary. For to proceed without equality of tenor is negligence, and to observe method unartificially is ignorance. They that give a reason of the beginning, continuance, and ending of their tractats and discourses, are without doubt the most judicial and most plausible methodists: or they which so temper and

moderate the course of matters, that though they render not a precise reason of their doings: yet it is apparent to the reason and understanding of others. A two-fold method is very much talked of, and that is by proceeding either *a singularibus ad universalia*, or *ab universalibus ad singularia*, the one of these I account no method at all, howsoever it hath usurped the name, being but a natural discerning of things done in *facto*, by the ordinary direction of the senses, and making thereof a general conclusion, which is easy and familiar to every man's capacity, so that the praise of the action is diligence and not art, for is it any difficult thing to reason and conclude, wood is heavy, stone is heavy, iron is heavy, *et sic in cæteris*: therefore all things made of earth are heavy: how prone and ready is the perceiving of these particulars to every man's sense: and how easily may the conclusion be framed by his understanding? but in deed the discoursing from universals to particulars is more hard, more artificial, more compendious, for it is done in less compass

and fewer words, which is a great argument of good method, and therefore I do not agree to Aristotle, the Athenian doctor, when he saith, *Ars tum existit, cum ex multis experientiæ notionibus una quæ ad universum genus accommodetur nascitur præceptio*. * Unless he mean it of vulgar and mechanical trades and occupations, whereof only I admit it to be true, but I rather approve that which he saith, and doth likewise: *progrediendum ab universalibus ad singularia* †. But there be some which will not allow any discourse but that which is furnished with mathematical and demonstrative reasons. Some would have every thing handled by examples, as *Ramus* a man happier in writing, than in reprovng one that writ better than he: who in handling logical places doth illustrate them with many examples, but with never a rule. What manner of teaching is this, to shew unto thee that others did this: but not to shew why they did so: which default is for want

* Metaphys. 1. c. 1.

† Physicor. 1. c. 1.

of rules, in which the reason and knowledge of doing things right is contained. A man cannot make a shoe by a number of lasts, but he must have instruction of one that is skilful in the trade. Some again will have every thing confirmed by the authorities and testimonies of them that be learned, thinking that only to be the fit way of teaching. But the certain and necessary reasons of the mathematics, are not in all arts to be required *. Neither is there an *ακριβεια* or accurate kind of handling things in all sciences alike to be used and observed: but in every science things are so to be ordered and digested, as the subject or matter doth require whereabout it is employed, and so far forth as may be agreeable to the profession of the science. For a geometrician and a carpenter do diversly handle and use a right line, the one as it may be profitable to his work, which he carveth, the other searcheth what kind of thing it is, and of what nature, and so other sciences

* Arist. Metaphys. 1. part poster. c. 3.

must be ruled by the subject which they contemplate, lest there be more *κατὰ* than *ἐν* in them: neither is a cause or reason to be exacted in all things, for of many it is sufficient to have this knowledge *quod ita sunt*, though we cannot know *propter quod ita sunt*, as of principles, which are the first and highest rules in arts and sciences, and therefore no reason can be yielded because they are *prima*, the very first in the discourse of reason, and therefore *αὐτονισα* for themselves to be believed. Surely method is so convenient a thing in the study of the law, that without it neither can the understanding be well taught, nor the memory well directed. It is not enough to have a great heap of things that are to be read, unless the use or order and manner of reading them be well understood: and as in things that be fit for banquets, though there be great variety of sweetmeats, yet there is nothing more unpleasant or unwholesome if they be mingled together, so the student must have a care lest the order of his reading be

confounded, lest the last things be handled in the first place, and these things which should be in the midst be put in the last place, which whosoever do, they cannot only not comprehend the things which they study, but utterly debilitate and weaken the strength of the memory: therefore it is good for students to use an artificial analysis, or resolution of things, into their principles, which may teach to divide the whole into its parts, and to subdivide parts into parcels, and in the end to make a consent and coherence of the entire thing and its parts: for though the skilful partition of things be profitable and pleasant for the memory, yet the synthesis, that is the apt composition, co-ordination, and mutual dependance of them doth more satisfy the understanding. * Therefore Polybius, a judicious author, saith well, that they who think by the knowledge of particulars dispersed to attain to the full and perfect knowledge of the entire thing, do no less

* Polyb. li. 1. histor.

err, than he who viewing the parts of a handsome and comely body severally and apart, doth therefore imagine that he knoweth the whole feature and protraiture of the same man, who if he had beheld these parts joined together, and compacted, and moved by the spirit of life, would have judged far otherwise. For though a man may have a confused notion, or conceit of the whole, by viewing the separate and disjoined parts, yet it is not possible he should have certain knowledge of the same, no more than a man by seeing particular maps of cities, may certainly perceive the figure, situation, and order of the whole world. But he that can easily resolve things, may easily compound: for when he knoweth the particular sense and use of the things resolved, he may easily gather a general knowledge of the whole thing; that is, a general knowledge of many particulars, which make one entire thing. The form of this analysis following which is of Master Littleton's two Chapters of fee-simple, and fee-tail, I do offer to the student, as a

thing to be considered of, because it is incident to this purpose, which though it gain not his good liking, yet if it minister but occasion unto him to adventure upon the conveyance of some other analysis, that may receive the general approbation, and just applause of the learned, I shall think my labour herein well bestowed, and would gladly reap profit by other men's precedents.

OBSERVATIONS UPON THE ANALYSIS.



THIS definition, which Master Littleton useth, soundeth like a good logical definition, as consisting of the true *genus*, and the proper difference: for this word (Inheritance) is the *genus*, which extendeth as well to fee-simple as to fee-tail, and this word (pure) is a difference, whereby it is distinguished from fee-tail: for fee-simple is a pure inheritance, that is without limitation or restraint, but fee-tail is a limited or a restrained inheritance. This word (lawful) in the definition is not idle; but the meaning of it is, that it is an inheritance according to the meaning of common law, for if by (lawful) should be meant rightful, then a fee-simple by disseisin should be excluded, which I think was not Mr. Littleton's in-

tent. And again, if this word (lawful) should extend to all laws, inheritance should be here taken according to the interpretation of other laws also, which cannot be. Master Littleton well beginneth with the definition, for there are but four things to be doubted of: first, whether a thing be *in rerum natura*: secondly, what it is, and of what nature: thirdly, whether it be such and so qualified or no: fourthly, why it is such, and so qualified: and he that well openeth these four points, shall in all learned discourses shew himself excellent and absolute.

The nature of fee-simple may be somewhat understood by applying to the subject to which it appertaineth, for tenant in fee-simple, and tenure in fee-simple, being *conjugata*, he that well knoweth the one, must of necessity well understand the other.

Master Littleton lastly describeth estate in fee-simple by certain adjuncts or properties, which do greatly serve to illus-

trate and explain the things whereof we treat: they are of two sorts, external and internal. Internal are they which flow from the nature of the thing itself: of such sort are the first and third properties mentioned in the *Analysis*, for in that fee-simple may lineally descend and not lineally ascend, the nature of the tenure is the only cause, for it being to a man and to his heirs, the more worthy heir is he that is of the body, the less worthy he that is of the blood and not of the body; but the father in regard of the son can be neither of these; but in regard and by mediation of the uncle he may be heir to the son, because he is of the uncle's blood, so that in the direct line it is evident, that the fee-simple cannot ascend: and it is a very essential property to fee-simple to be the largest and greatest inheritance, because it is to a man and his heirs without limitation. External properties are these, which do so go before a thing, or so follow it, or so cleave to it, that notwithstanding there is no necessity of any of these: as for example, before the killing of a man, commonly there is

some brawling and contention of words. With the act doth concur the sighing or groaning of him that is slain, and the flight, fear, lurking, trembling, and unconstant answer of him that did kill him do follow the act, howbeit some be slain without the concurrence of these circumstances. There be two sorts of adjuncts, some belonging to the person, some to the thing itself ; to the person as the kindred, country, sex, age, education, the habit of the body, the fortune, the estate, the qualities of his mind, the manner of his life. The adjuncts of the thing are the causes, the place, the time, the manner of doing a thing, and such like. Of these, some be common, and some be proper : common, as if one should commend Achilles, because he was of good birth, because he was a great captain, because he was in fight against the Trojans, for every of which, Diomedes is as much to be commended as Achilles. Proper adjuncts be, as if thou shouldst commend Achilles for his great valour in killing Hector the stoutest of the Trojans, and for his good fortune in killing Cygnus, who being invulnerable,

did bar all the Grecians from coming down the wall, and because being young and not bound by any oath or legiance; he fought so valiantly for the Grecians. These two latter of the proper adjuncts, I call external, as not flowing from the essence of a thing, but befalling externally to it when it is *in esse*. Of this kind there are two in the Analysis, the second and fourth.



OBSERVATIONS UPON THE ANALYSIS.

THIS definition which Master Littleton maketh of estate tail, consisteth likewise of *genus*, and of a difference. The *genus* is *hæreditas*, which is common both to it and to fee-simple: the difference *in quadam certitudine limitata*, by which it is distingusihed from fee-simple, for that is *non limitata & sine certitudine*, and by this definition a man may know what a fee-simple is, and by the definition of fee-simple what fee-tail is, so that the rules of art are well observed, which are that *Rectum est judex sui obliqui*, and *opposita juxta se posita magis illucescunt*.

Though the division or tenure of estate tail doth in the table precedent consist of two members, or two differences, yet the especial tail is divided into more parts: and that manner of dividing is not contrary to the rules of method, for it is too much curiosity to exact in every division two only opposed essential differences, and two

distinct kinds. There be three causes wherefore a division cannot be made by two differences. First, because of no kind of thing, both the essential differences cannot certainly be known, but the one of them we do express by a negative. Secondly, because that difference which we set down in the affirmative is not always the true difference. Thirdly, because the diverse nature of diverse immediate kinds of one thing will not always permit a two-fold division, for though the division of *Animal in hominem & brutum* be *bimembris* and according to rigorous exaction, yet since there be many kinds of brutish creatures, some that swim, some that fly, some that go, some that creep, and the particulars of these kinds do differ in the quintessence of their nature, surely to comprehend all these distinct things under two differences is not to be required, because it is either impossible, or a thing of exceeding difficulty. But when things are to be handled by way of disputation, as the arguing of cases which is of great use in the Law, another method and course

must be used than hath been taken in the framing of this Analysis; for there the principal case must be fully set down, the points of Law orderly distinguished, the reasons on the one part must be first set down, with answers annexed unto them, then the reasons on the other part, with answers likewise in their due places: and lastly, the conclusion of the whole controversy debated, whether it were by judgment, adjournment, or by the concord of the parties, or by other special means, and for better direction herein (I am desirous to profit others if I could) I have set down an homely pattern according to the plans of my conceit, in the disposing and ordering of a case, famous in our year books, and of great weight and use, being the Prior of Merton's case, being very often at large argued, namely in the 18, 19, 20, and 21, years of the reign of King Edward IV. at several times, and was likewise touched the second year of Richard III. and all the contents of the arguments upon this case delivered, as many as did concern the principal points then in question (for

bye-matters are to be reposed in a several place by themselves) I have brought into the compass of a few lines, if you respect the large leaves wherein they are handled.

**THE CASE BETWEEN THE PRIOR OF MERTON,
PLAINTIFF, AND THE PRIOR OF BINGHAM,
DEFENDANT.**

IN the 3d. year of Henry III. a fine was levied between the Prior of Merton, Plaintiff, and the Prior of Bingham, Deforçant*, upon a writ of covenant, which was in these words: This is the final agreement between the Prior of Merton, Plaintiff, and the Prior of Bingham, Deforçant, of five marks and five shillings rent, *with the appurtenances* in S. and R. Whereupon a writ of covenant was summoned between them which was that the aforesaid Prior of Bingham hath acknowledged and granted for him and his successors, that at all times thereafter they would pay every year at the Church of Merton for the tenements which he held of the said Prior, and for the tenements

* *Scire Facias*, 18. E. 4. 22. 19. E. 4. 2. 47. 20. E. 4. 16. 21. E. 4. 60. 2. R. 3. 5.

which W. de W. formerly held of the said Prior in the villages aforesaid, five marks and five shillings, at two terms in the year, for all suits and services, and that he would do to the chief lord of the fee, for the aforesaid Prior of Merton and his successors, all such services as appertained to the said tenements : and in consideration of this grant the said Prior of Merton granted for him, and his successors, that they would warrant to the aforesaid Prior of Bingham and his successors, all the aforesaid tenements against all persons : whereupon came into the court, one J. Prior of Merton, and prayed a *Scire Facias* against W. Prior of Bingham, to have execution of the arrearages of the said rent, which were due in the years last past ; and he had it, and it was returned, &c. At which day the Prior of Bingham comes in, and says, that the fine proves the rent granted to the predecessors of the Plaintiff, to be a rent service, or some other rent issuing out of the land and not an annuity, because inasmuch as he hath acknowledged, that the rent was executed, he ought to have an

assize or distress, and not a writ which is in nature of a writ of annuity, and upon this they demur.

THE QUESTIONS OF LAW.

1. *Whether the fine was well levied?*

2. *Whether the rent be an annuity?*

1. *Negat. That the fine was not well levied.*

LITTLETON.

A. *Ratio Prima*.—Fines are not good being levied of things which are not *in rerum naturâ* at the time of the fine levied, and the rent of which this fine was levied was not *in esse* at the time, wherefore, &c.

BRIAN.

B. *Responsum*.—That is not necessary, for if I have in Islington twenty pounds rent issuing out of lands of twenty men by several grants, if I grant by fine to you twenty pounds rent out of their lands or

tenements in Islington, you shall not have the twenty pounds rent which I have in Islington, but you shall have a novel rent : but there is a diversity where the thing of which the fine is to be levied lies in demesne, and where not, for where it lies in demesne, there it ought to be *in esse* at the time of the fine levied, as if I levy a fine of my land in Dale where I have not any land in Dale, this fine is void, but of a thing which may issue out of land a fine may be levied, although it be not *in rerum naturá*, as of rent or common in Dale, where in fact he had not any common or rent in Dale at the time, &c. But if he had common in gross in the same Vill, and grants to me a common, and does not shew what common, it shall be construed the common which he hath in that Vill.

NEALE.

C. *Ratio* 2.—This fine is levied of a mere annuity, and for that it is bad, *Contra*, if the thing naturally arose out of the and,

as if I acknowledge all my right in one acre of land to you, and you by the same fine grant to me an annual rent of twenty shillings out of the same land, that is a good grant, although there was not any original of it, wherefore, &c.

BRIAN.

Respons.—In ancient times a man might have acknowledged a fine without an original, and if it be levied at this day he may have *Scire Facias*, and if an advowson descend to coparceners, and they by indenture inrolled will agree to present by turn, each of them when their turn comes shall have a *Scire Facias*, wherefore, &c.

PIGGOT.

Replicat. ad hoc Respons.—In ancient times fines were levied *Deo & Ecclesiæ*, but the law is now altered : but as I think every fine ought to have an original and to

agree with it, for the note is a *Plea of Covenant*, and in our case there is not any covenant of an annuity, but of a rent only; and if the original be of twenty acres, and the fine be levied of forty acres, as to that twenty acres the party shall be discharged: for there was not any original for them, and in the *precipe quod reddat*, the fine may be levied of the thing in demand, for the original contains and concerns that; so if a writ of covenant be of twenty acres in Dale, and the fine is levied of twenty acres in Sale, the fine is not good, or if the original be of arable land, and cognizance of pasture.

1. *Affirmat.* That the fine was well levied.

SULYARD.

D. *Ratio* 1.—If in a writ of covenant brought of a manor, the Plaintiff grants the manor to the Defendant, and grants besides to discharge the said manor against the lord of the fee, it is a good fine, and

yet the clause of discharging was not in the writ of covenant, then in this case, &c.

SULYARD.

E. *Ratio 2.*—If in a writ of right of customs and services, the lord may release by fine all his right, which he hath in the land, and the tenant may grant by the same fine 20s. annually, then, &c.

CATESBY.

Ratio 3.—When a man acknowledges the right of the land to one, and a rent is reserved upon the grant and render, or a common, or so many cart loads of wood to be taken out of the land, it is good, for they are contained implicitly, in the original, but if the fine is levied of a thing neither expressed nor implied in the original, it is void ; then, in this case, because the fine is of a rent service, for the fine is *pro omnibus aliis Servitiis*, by this word

aliis it is implied, that the rent is some service.

2. *Negat.* *That the rent in this case is not an annuity.*

PIGGOT.

F. *Ratio* 1.—The fine is that the Prior of Merton for the services aforesaid, acquits the Prior of Bingham of all services against the lord of the fee, and therefore it is a rent service and not rent seck.

COLLOWE.

Respons.—The rent is changed by the fine, for both the parties shall be estopped to deny the estate taken by the fine, as if a man be seised of land in fee, and a fine be levied between a stranger and him, by which the stranger acknowledges the same land to him and to the heirs of his body begotten, now his estate is changed, so if a man held by knights service, and the

lord by fine acknowledges that he holds in soccage, now the tenure is changed, and he shall hold in soccage, and in this case the rent cannot be rent service, for then the party might distrain upon the land, and that cannot be; for all suits as to the land are discharged by the fine, and it cannot be a rent charge, for no land is charged with the distress; and rent seck it cannot be; for then it should be demanded upon the land; and annuity it cannot be, for the Prior cannot charge the house.

Piggot.

G. Ratio 2.—If the Prior of Bingham cannot extinguish the services by his words, or by his act, the rent service continues, wherefore, &c.

Ratio 3.—If a man hold of me by twenty shillings, and I confirm his estate to hold by one farthing for all manner of services, he shall do fealty, and this rent is parcel of the ancient rent, wherefore, &c.

2. *Affirmat.* That the rent is an annuity.

STARKEY.

I. *Ratio 1.*—If a man cannot grant to another that which he had before, then the rent which the Prior of Bingham granted to the Prior of Merton, it cannot be the ancient rent, but a novel rent or an annuity, wherefore, &c.

Confirmatio.—If I hold of you by homage, fealty, and ten shillings rent, and I would grant to you by fine 12d. rent for the tenements which I hold of you, it is a novel rent, and not the ancient rent, wherefore, &c.

VAVASOUR.

K. *Ratio 2.*—By fine *Sur Conusance de droit come ceo*, a novel rent may be granted, for he to whom the cognizance is made may grant a rent to the cognisor, and the reason is because it shall be intended that he to whom the cognizance is made is seised

of the land : but otherwise is it of a fine, *Sur grant et render*, for the lord doth not intend that the grantee is seised of the land, then in this case the rent is a novel rent.

CHOKE.

Ratio 3.—These words, that the Prior of Bingham shall perform all the services for the Prior of Merton, do not prove it to be rent service : for if there be lord and tenant, and the lord release to the tenant by deed indented all his right which he hath, *rendering one penny, and doing to the chief lord the services, &c.* on the behalf of the lord. These words are void, for by the release his seigniority is extinct, then in this case, &c.

Judgment.—Three of the justices awarded, that the Plaintiff might sue execution by *Scire Facias*, and thereupon judgment was entered, and immediately *Sedente Curia*, a writ of error was put in, and it was touched upon in the King's Bench, 2. R. 3. but it is not there decided nor argued.

OBSERVATIONS UPON THE PRECEDING FORM
OF ARGUING.

A. THE first reason made by Master Littleton is drawn from the cause of the thing generally, and specially from the material cause: For if the only material causes of fines be things which are *in esse*, it is a probable conclusion to say that of this rent being not *in esse*, a fine could not be levied. And as the rule of logic is, *Quæ eadem sunt eorum generationes et corruptiones, causæ constituentes et corrumpentes eadem sunt* *: So of such things which be the same in kind, the causes material are the same: and therefore the material causes of fines, that is the thing whereof they are levied, ought to be the same.

B. The answer of Brian to Master Littleton's reason is by way of distinguishing, for every answer must be either by direct granting, or direct denying, or else by distinguishing which is partly a granting, partly a denying.

* Arist. Top. 7. c. 1.

C. Master Neale's reason is drawn from the same place of logic, from which Master Littleton's was derived : for he supposeth that an annuity is no fit material cause whereof a fine may be levied.

D. Sulyard's reason is drawn *a comparatis paribus* from things alike probable : For if a man in a writ of covenant brought of a manor, may grant and covenant to discharge the said manor against the lord of the fee, though in the writ of covenant there were no mentioning of any such discharge : by the like reason a man may levy a fine of a thing which is not mentioned in the writ of covenant, and which was not *in esse* before. And this manner of reasoning is grounded upon that rule in logic, *Si duo duobus æque convenient, et hoc huic conveniat, etiam illud illi conveniet**.

E. Sulyard's second reason is drawn *a simili* : For like as in a fine levied upon a writ of right brought of customs and services, the tenant may grant a rent which was not *in esse* before : so likewise in this case the fine might be levied of a rent,

* Arist. Top. 2 c. 4.

which had no being before. And this consequence is warranted by this rule, *Si in uno eorum quæ similia sunt aliquo modo se res habeat, eodem etiam modo in aliis se habebit**.

F. The first reason whereby Piggot goeth about to prove that the rent is not an annuity is deduced *a genere* : For if it be truly named by the general name of service in the fine, it must be intended to be a special kind of rent service, and not a rent seck, according to the rule, *Si aliquid sit genus, species ab eo comprehensa participabit natura ejus, sed non natura ejus quod est contrarium generi*.

G. Piggot's second reason is drawn *a comparatis paribus*.

H. His third reason is drawn *a simili*.

I. Starkey's first reason is drawn *a comparatis paribus*.

K. The reasons used by Vavasour and Choke to prove the rent to be an annuity are drawn *a simili*.

* Arist. Top. 2. c. 4.

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Ref^d R.H.15.5.47



